92-1523

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BANK ONE, TEXAS, N.A., AND BANC ONE CORPORATION,
Petitioners,

vs.

WICHITA FALLS OFFICE ASSOCIATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given the plain language of Rule 56(f) of the Federal Rules of Civil Procedure and this Court's recent statement in *Leatherman v. Tarrant County Narcotics Unit* that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later," can a party opposed to the entry of summary judgment complain that it was deprived of an adequate opportunity to secure allegedly relevant discovery when it is undisputed that such party failed to comply with the provisions of Rule 56(f)?

2. Assuming, *arguendo*, a nonmovant who fails to comply with Rule 56(f) of the Federal Rules of Civil Procedure can nevertheless attack the district court's entry of summary judgment as premature, under what circumstances may a district court ever safely proceed to grant a motion for summary judgment?

3. Does a Circuit Court of Appeals have the power to create an "exception" to a Federal Rule of Civil Procedure?

RULE 14.1(b) LIST

The parties to the proceeding in the court whose judgment Petitioners seek to have reviewed were as follows:

1. Petitioner Banc One Corporation, a corporation organized and existing under the laws of the state of Ohio, whose principal place of business is in Columbus, Ohio.

2. Petitioner Bank One, Texas, N.A., a national banking association organized and existing under the laws of the United States, whose principal place of business is in Dallas, Texas.

3. Respondent Wichita Falls Office Associates, a limited partnership organized and existing under the laws of the State of North Carolina, whose principal place of business is in Burlington, North Carolina.

RULE 29.1 LIST

The parent company of Petitioner Bank One, Texas, N.A. is Banc One Texas Corporation, a wholly owned subsidiary of Petitioner Banc One Corporation. Petitioner Banc One Corporation has interests in the following nonwholly owned subsidiaries: Banc One Capital Partners Corp. II; Freedom Bank, Glen Rose, N.A.; Banc One Compensation Services Corp.; Bank One, Oshkosh, N.A. and Bank One, Peoria.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Banc One Corporation and Bank One, Texas, N.A. (collectively, "Petitioners") hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 978 F.2d 915, and is reprinted in the appendix hereto. *App. A.*

The memorandum opinion of the United States District Court for the Northern District of Texas (Sanders, C.J.) has not been reported. It is reprinted in the appendix hereto. *App. B.*

JURISDICTION

On December 4, 1992, the United States Court of Appeals for the Fifth Circuit entered its judgment reversing the judgment of the district court. *App. A.* Petitioners filed a timely Petition for Rehearing. It was denied pursuant to an order entered by the Fifth Circuit on January 20, 1993. *App. I.*

Petitioners invoke the jurisdiction of this Court to review the judgment of the Fifth Circuit by writ of certiorari under 28 U.S.C. § 1254(1).

RULE INVOLVED

The questions raised in this Petition involve, *inter alia*, the construction and application of Rule 56(f) of the Federal Rules of Civil Procedure ("Rule 56(f)"). Rule 56 of the Federal Rules of Civil Procedure reads in its entirety as follows:

Rule 56. Summary Judgment

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

In this case, the United States Court of Appeals for the Fifth Circuit reversed a summary judgment dismissing Respondent's claims against Petitioners Bank One, Texas, N.A. and Banc One Corporation. It did so not because it determined that the record revealed the existence of a genuine issue of material fact, but only because it concluded that "the district court [had] prematurely terminated discovery." *App. A-2.*

Ironically, the record of the proceedings before the district court shows that Respondent never sought relief under Rule 56(f), never sought a continuance of the summary judgment proceedings and never complained that it had been denied an adequate opportunity to obtain evidence essential to justify its opposition to Petitioners' summary judgment motion. Furthermore, the district court's order granting summary judgment was entered (i) eighteen months after Respondent had filed its complaint, (ii) almost a full year after Petitioners had filed their motion for summary judgment, and (iii) ten months after Respondent had filed its papers in opposition to summary judgment. Even more disturbing, the record reveals that Respondent waited more than eight full months *after* filing its response to Petitioners' motion for summary judgment before initiating any effort to secure the very discovery it now characterizes as having been critical to its ability to oppose the entry of summary judgment.

Rule 56(f) specifies the procedure the opponent of summary judgment must utilize when it seeks additional time to garner

evidence essential to justify its opposition to the motion. In the case at bar, it is undisputed that Respondent failed to comply with Rule 56(f). *App. A-8; A-9, N.6.* Petitioners submit that Respondent's failure to comply with the minimal requirements of Rule 56(f) conclusively demonstrates that the Fifth Circuit erred in reversing the judgment of the district court. As set forth below, the Fifth Circuit's reasoning conflicts with the law in seven other circuits, and is inconsistent with both the plain language of Rule 56(f) and this Court's prior precedents. For these and other reasons described below, Petitioners respectfully request that the Court grant their Petition, reverse the Fifth Circuit's judgment and render judgment in favor of Petitioners.

The Complaint:

On November 14, 1989, Respondent commenced this action against Petitioners and the Federal Deposit Insurance Corporation ("FDIC") in the Wichita Falls Division of the United States District Court for the Northern District of Texas.[1] Respondent's complaint alleged, *inter alia*, that Petitioners were liable for damages that Respondent sustained as a consequence of the failure of MBank Wichita Falls, N.A. ("MBank"). The complaint alleged that Respondent and MBank entered into a sale-leaseback transaction with respect to a building located in downtown Wichita Falls, Texas. Under the terms of the transaction, Respondent acquired the building from MBank, financed its acquisition of the building by giving MBank a nonrecourse promissory note and then leased the building back to MBank. According to Respondent, the concept was that the stream of rental

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[1] Respondent invoked federal jurisdiction "under 28 U.S.C. § 1331, as an action arising under the Federal Deposit Insurance Act, 12 U.S.C. 1811, *et. seq.*; the Fifth Amendment to the Constitution of the United States, federal common law, and principles of pendent jurisdiction." *Federal Sav. & Loan Ins. Corp. v. Mackie*, 962 F.2d 1144 (5th Cir. 1992).

payments under the lease would ultimately retire the debt evidenced by the nonrecourse note.

When MBank was declared insolvent, the FDIC established The Deposit Insurance Bridge Bank, National Association ("DIBB") as a bridge bank under 12 U.S.C. § 1821, and conveyed most of the assets of the defunct MBank to DIBB pursuant to the terms of a Purchase and Assumption Agreement (the "P&A Agreement"). For its part, DIBB agreed in the P&A Agreement to assume certain specified liabilities of the failed MBank, "and none other." Subsequently, DIBB changed its name to Bank One, Texas, N.A.[2]

Respondent's suit alleged that (i) Petitioner Banc One Corporation had breached an implied duty of good faith and fair dealing owed to Respondent; (ii) Petitioner Banc One Corporation had tortiously interfered with Respondent's existing and prospective contractual relations; and (iii) both Petitioners had breached contractual obligations owed to Respondent.

Petitioners' Motion for Summary Judgment:

Petitioners responded to the Complaint by filing a motion to dismiss or, alternatively, to transfer venue to the Dallas Division of the Northern District of Texas. The Wichita Falls Division granted Petitioners' motion to transfer venue, and denied their motion to dismiss without expressing any view on the merits of the motion. *App. G; H.*

On June 22, 1990, after the case had been transferred to the Dallas Division, Petitioners filed their Second Motion To Dismiss For Failure To State A Claim, Or, Alternatively, For Summary Judgment. Respondent answered the motion on July 27, 1990, by filing the evidentiary affidavit of its general partner, David Pardue,

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[2] A subsidiary of Petitioner Banc One Corporation ultimately acquired all of DIBB's stock.

and a brief attacking the merits of Petitioners' motion.[3] Significantly, Respondent's papers in opposition to the motion never even hinted that Respondent might be interested in invoking the safety net provided by Rule 56(f). Respondent neither requested a continuance of the summary judgment proceedings, nor filed an affidavit of the type mandated by Rule 56(f). Indeed, Respondent's papers in opposition characterized Petitioners' motion for summary judgment as a "weak, back of the hand effort," and confidently asserted the existence of numerous genuine issues of material fact:

> "Because WFOA has alleged, and provided documentary and testimonial support for, numerous issues of material fact supporting the complaint's causes of action against Banc One, and because Banc One has treated its so-called summary judgment motion as little more than a flippant halfbaked "label," failing to even address the issue in its brief, this Court should deny Banc One's "alternative" motion.

In essence, Respondent admitted that it did not require additional discovery to develop facts "essential to justify its opposition" to Petitioners' motion for summary judgment.

On August 22, 1990, Respondent filed a motion to consolidate consideration of Petitioners' summary judgment motion with Respondent's own motion for a preliminary injunction.[4] *App. A-4.* Respondent's motion to consolidate, filed less than a month after its papers in opposition to Petitioners' motion for summary judgment, contained the following statement:

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[3] In accordance with Rule 5.1(e) of the Local Rules of the Northern District of Texas, Petitioners' motion for summary judgment was "deemed ready for disposition" on the date Respondent filed its opposition — July 27, 1990.

[4] Ironically, Respondent sought an injunction prohibiting Petitioner Bank One, Texas, N.A. from vacating its building notwithstanding the fact that its Complaint charged Petitioners with deliberate acts of malfeasance and tortious conduct. *App. B-13.*

> "On July 30, 31, and August 1, 1990, WFOA deposed two senior officers of the Banc One defendants and a senior attorney employed by the FDIC designated as a Rule 30 (b)(6) witness. These witnesses provided dispositive incriminating admissions on all the major issues raised by WFOA's complaint."[5]

It is important to note that the depositions referenced in the above-quoted statement were all conducted in the three day period immediately following the date Respondent filed its response to Petitioners' motion for summary judgment. Thus, the statement was an unequivocal admission by Respondent that it required no further discovery to meet Petitioners' pending motion for summary judgment.

Rulings In The Courts Below:

On April 4, 1991, nine months after the summary judgment motion had been filed, Respondent served Petitioners and co-defendant FDIC with fifteen additional notices of deposition. The notices scheduled thirteen of the fifteen depositions for the two-week period from April 23, 1991, to May 6, 1991. The two remaining depositions were set for May 10, 1991. *App. A-4.* At the time it served its deposition notices, Respondent also served extensive requests for production of documents on both Petitioners and the FDIC. *App. A-5.* Convinced that their motion for summary judgment was meritorious, and that Respondent's belated barrage of discovery would result in a needless expenditure of time and money, Petitioners moved under Rule 26(c) of the

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[5] The Fifth Circuit's statement to the effect that Respondent "*sought* to obtain discovery of [sic] both Banc One and the FDIC in connection with the pending motion" is potentially misleading. *App. A-4.* As evidenced by Respondent's own above-quoted statement, Respondent *did* obtain discovery from both Petitioners and their co-defendant, FDIC. Significantly, Respondent never directed any of its discovery at Petitioners' pending motion for summary judgment; it always believed that its response to Petitioners' motion was more than adequate to ensure the motion's defeat.

Federal Rules of Civil Procedure for an order staying all further discovery until such time as the district court had issued its ruling on Petitioners' long-pending motion for summary judgment.

Petitioners' motion for protective order was referred to a Magistrate Judge for determination. Following a telephone conference with all counsel, the Magistrate Judge denied the motion, but stayed the effect of his order to afford Petitioners an opportunity to file objections to his ruling with the district court. *App. F.* Contrary to the impression left by the Fifth Circuit, the Magistrate Judge did not conclude that Respondent required additional discovery to respond to the pending motion for summary judgment. Instead, the Magistrate Judge was concerned that the issuance of the requested protective order might interfere with the discovery cutoff and trial dates established by the district court's Rule 16 scheduling order. *App. F-1.*

Petitioners filed objections to the Magistrate Judge's order with the district court arguing, *inter alia*, that discovery should be stayed because Respondent had failed to allege even a colorable claim against either of them, and because the requested discovery was wholly irrelevant to any issue raised by the motion for summary judgment. *App. E-1.* Respondent countered by explaining that the discovery sought was designed not only to uncover facts relevant to its existing claims, but also to identify new parties and claims to be added to the litigation. Indeed, Respondent admonished the district court that it "should not be taken in by the Bank One defendants' mischaracterization of plaintiff's discovery focus," and explained that it was invoking the discovery process to find factual support for "potential claims" and not just to support its existing causes of action.[6] Although Respondent's

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[6] In its argument before the Magistrate Judge, Respondent never complained that it required additional discovery to meet Petitioners' motion for summary judgment. In the "Response" it filed with the district court in opposition to Petitioners' objections to the ruling of the Magistrate Judge, Respondent explained that it had urged the

memorandum in opposition to Petitioners' objections suggested that some of the discovery was "relevant" to its existing causes of action, and might "support its opposition to the defendants' motion for summary judgment", it never at any time characterized the discovery as being "essential" to justify its opposition to the motion for summary judgment. Respondent's papers in opposition to Petitioners' objections to the Magistrate's ruling did not include an affidavit complying with Rule 56(f). Indeed, Respondent never requested the district court to delay its consideration of the motion for summary judgment pending the completion of additional discovery.

On June 4, 1991, the district court reversed the Magistrate Judge and stayed all discovery pending "further order of this Court." *App. E.* In so ruling, the district court noted that Petitioners' motion for summary judgment had been on file for almost a full year, and that Respondent's papers in opposition to such motion had been filed more than eight months before it served the discovery requests that were the subject of Petitioners' motion for protective order. *App. E-2.* The district court was persuaded that statements made by Respondent in its papers in opposition to Petitioners' motion for summary judgment amounted to a representation by Respondent that no further discovery was "needed to adequately address the Banc One Defendants' pending summary judgment motion." *App. E-2.*

On June 5, 1991, one day after the order reversing the Magistrate and staying discovery, the district court issued its memorandum opinion and order granting Petitioners' motion for summary judgment. *App. B.* It subsequently entered final judgment in favor of Petitioners pursuant to Fed. R. Civ. P. 54(b). *App. C; D.* On appeal to the Fifth Circuit, Respondent argued,

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Magistrate Judge to deny Petitioners' motion for protective order because the discovery was necessary to determine "whether there was a need to amend the pleadings or add parties, as well as to explore existing issues scheduled *for trial.*" (emphasis added).

inter alia, that the summary judgment must be reversed because the district court erred in denying it the opportunity to complete discovery. The Fifth Circuit agreed, concluding that "the amalgam of WFOA's actions" put the district court on notice that Respondent sought discovery on issues that were "germane to the pending summary judgment motion and therefore the stay was improvidently granted." *App. A-9.* The Fifth Circuit explained that it was relying on what it characterized as an "exception" to Rule 56(f) as the basis for its decision to undo the summary judgment. *App. A-9, N.6.*

In response to Petitioners' charge that Respondent had delayed seeking the supposedly essential discovery for an inordinate amount of time, the Fifth Circuit acknowledged that a lengthy period of time had elapsed before Respondent served its discovery requests. *App. A-7.* Nevertheless, it excused Respondent's delay in seeking the discovery, finding that Respondent had "reasonably awaited the outcome of pending [settlement] negotiations with the FDIC." *App. A-7.* Significantly, the Court of Appeals failed to acknowledge that (i) there was never any agreement, formal or informal, between Petitioners and Respondent authorizing the latter to forego taking discovery pending the completion of its settlement negotiations with the FDIC; and (ii) even assuming, *arguendo*, such an agreement had existed, the district court never authorized Respondent to delay taking discovery for any reason.

Furthermore, the Fifth Circuit's opinion makes no reference to the fact that Respondent repeatedly informed the district court in written status reports that there were no ongoing settlement negotiations with Petitioners, and that a settlement with Petitioners was unlikely. *App. J, K, L.* Thus, the record demonstrates that the parties and the district court clearly understood that a ruling on the merits of Petitioners' summary judgment motion would be necessary. Given the posture of the case in the district court, Respondent's unilateral decision to delay taking the very discovery it later characterized as having been critical to its ability to

rebut Petitioners' summary judgment motion can hardly be described as "reasonable."

REASONS FOR GRANTING THE WRIT

I. ALL CIRCUITS HAVING ADDRESSED THE ISSUE, THEY ARE SHARPLY DIVIDED ON THE QUESTION WHETHER A PARTY OPPOSING THE ENTRY OF SUMMARY JUDGMENT MUST COMPLY WITH FED. R. CIV. P. 56(f) TO OBTAIN ADDITIONAL TIME TO CONDUCT DISCOVERY "ESSENTIAL" TO JUSTIFY ITS OPPOSITION TO THE MOTION.

The circuits are in disarray over the proper construction and application of Rule 56(f). Seven require that the nonmovant comply with Rule 56(f) to obtain additional time within which to develop facts essential to justify its opposition to a motion for summary judgment. The remaining six declare that it is unnecessary for the nonmovant to comply with the provisions of Rule 56(f) as a predicate to claiming the protections of that Rule. To illustrate the breadth of the inter-Circuit disagreement, Petitioners will quote pertinent statements of the law from each circuit.

The United States Courts of Appeals for the Tenth, Eighth, Seventh, Sixth, Third, Second and Federal Circuits require strict compliance with Rule 56(f):

> ***Tenth:***
>
> We review a district court's denial of a Rule 56(f) motion for an abuse of discretion. . . . A prerequisite to granting relief, however, is an affidavit furnished by the nonmovant. (citation omitted) . . . .
>
> We have considered presumably unverified statements in attorney memoranda and found them wanting as grounds for a Rule 56(f) continuance. *Committee For The First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (citations omitted).

See also Dreiling v. Peugot Motors of America, Inc., 850 F.2d 1373, 1376-1377 (10th Cir. 1988); *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 832-833 (10th Cir. 1986); *Weir v. Anaconda Co.*, 773 F.2d 1073, 1082-83 (10th Cir. 1985); *Gray v. Udevitz*, 656 F.2d 588, 592 (10th Cir. 1981).

* * *

Seventh:

When Florsheim requested the production of documents establishing Lytton's capitalization at the time of the l.b.o. and otherwise opposed Cluett's motion by arguing the merits of its piercing claim, it failed to submit a Rule 56(f) affidavit in order to secure the additional discovery it now claims was vital to its case. *See Federal Deposit Insurance Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (party opposing motion for summary judgment must file a Rule 56(f) affidavit if without knowledge to respond to the motion). Hence, because Florsheim failed to move for a continuance to obtain discovery under Rule 56(f), we cannot conclude that the district court abused its discretion in proceeding to rule on Cluett's motion for summary judgment. *Chicago Florsheim Shoe S. v. Cluett, Peabody & Co.*, 826 F.2d 725, 727 (7th Cir. 1987) (citation omitted).

See also Goldberg v. Household Bank, F.S.B., 890 F.2d 965, 968 (7th Cir. 1989); *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313, 317 (7th Cir. 1987) (nonmovant must file motion for continuance to invoke 56(f) protections).

* * *

Sixth:

True, Klepper had no opportunity to engage in discovery because the court stayed all discovery pending resolution of First American's summary judgment motion.

Normally, Klepper might have prevailed in his challenge of summary judgment on this ground. Fed. R. Civ. P. 56(f), however, sets

> forth the method for opposing summary judgment based on insufficiency of discovery . . . .
>
> Klepper had the burden of showing, by affidavit, why he was not able to oppose the motion for summary judgment. Klepper failed to meet his burden by not presenting any affidavit as required under Rule 56(f). *Klepper v. First American Bank*, 916 F.2d 337, 343 (6th Cir. 1990) (citation omitted).

See also Sharp v. United States Dept. of Health & Human Services, 1992 U.S. App. LEXIS 1012 (6th Cir. 1992) (nonmovant's failure to file Rule 56(f) affidavit "entitles the Court to grant summary judgment, even if discovery has not been completed."); *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989); *Shavrnoch v. Clark Oil And Refining Corp.*, 726 F.2d 291, 294 (6th Cir. 1984.)

* * *

Third:

> Here, appellants did not file a Rule 56(f) affidavit. Appellants contend that their attorney's unverified memorandum opposing the motion for summary judgment complies with the Rule 56(f) affidavit requirement. It does not. Rule 56(f) clearly requires that an affidavit be filed An unsworn memorandum opposing a party's motion for summary judgment is not an affidavit . . . .
>
> We cannot diminish the value of an affidavit by permitting an attorney's unsworn statement to replace it. The adversary system recognizes the right and practice of attorneys to take adversarial license with evidence and argue it as fact. It does not recognize argument as a surrogate for either evidence or fact. Thus, the statement is lacking both in substance, and in any indicia of evidentiary reliability contemplated by the requirements of Rule 56." *Radich v. Good*, 886 F.2d 1391, 1394-95 (3rd Cir. 1989).

See also Town Sound and Custom Tops v. Chrysler Motors, 959 F.2d 468, 494 n. 39 (3rd Cir. 1992); *Dowling v. City of Philadelphia*, 855 F.2d 136, 139-40 (3rd Cir. 1988); *Falcone v. Columbia Pictures Industries*, 805 F.2d 115, 117 n.2 (3rd Cir. 1986).

* * *

Second:

Finally, we note that Rule 56(f) requires the opponent of a motion for summary judgment who claims to be unable to produce evidence in opposition to the motion to file an affidavit explaining:

1) the nature of the uncompleted discovery, *i.e.*, what facts are sought and how they are to be obtained; and

2) how those facts are reasonably expected to create a genuine issue of material fact; and

3) what efforts the affiant has made to obtain those facts; and

4) why those efforts were unsuccessful. [citations omitted] . . . .

Burlington never filed such an affidavit. Instead, it mentioned Rule 56(f) for the first time only in its memorandum in opposition to the defendant's motion for summary judgment. A memorandum is not a substitute for an affidavit under Rule 56(f), and it has been held that the failure to file such an affidavit under Rule 56(f) is by itself enough to reject a claim that the opportunity for discovery was inadequate. *Burlington Coat Factory Warehouse Corp. v. Espirit De Corp.*, 769 F.2d 919, 926 (2d. Cir. 1985) (citations omitted).

See also Hudson River Sloop Clearwater, Inc. v. Department Of The Navy, 891 F.2d 414, 422 (2d Cir. 1989).

* * *

Federal:

LAG also raises the familiar cry that summary judgment was granted before it could complete its discovery. A litigant's right to discovery is fully protected by Fed. R. Civ. P. 56(f), which allows a court to refuse summary judgment if a litigant shows, "by affidavit," that additional discovery is necessary to uncover "facts essential to justify his position [sic]." On the other hand, a litigant's complaint that it needed discovery will not be heard on appeal when discovery was precluded by its own failure to seek Rule 56(f) protection. In this case LAG did not invoke Rule 56(f) and attempt to convince the trial court that it could not

> properly respond to Avia's summary judgment motion without additional discovery. Had it done so, there would an appealable discovery issue. Having failed to do so, there is none. *Avia Group Intern., Inc. v. L.A. Gear California*, 853 F.2d 1557, 1561 (Fed. Cir. 1988).

See also *New America Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1081 (Fed. Cir. 1989); *Keebler v. Murray Bakery Products*, 866 F.2d 1386, 1389 (Fed. Cir. 1989) (opponent of summary judgment seeking additional time must "set out reasons for the need for discovery in an affidavit."); *Sweats Fashions v. Pannill Knitting Co.*, 833 F.2d 1560, 1567 (Fed. Cir. 1987).

The Eighth Circuit clearly requires that the nonmovant comply with the conditions of Rule 56(f) as a prerequisite to claiming the benefits of that Rule. *See Pittman v. Gaines*, 905 F.2d 199 (8th Cir. 1990); *Puckett v. Cook*, 864 F.2d 619, 622 (8th Cir. 1989); *United States ex rel Small Business Admin. v. Light*, 766 F.2d 394, 397-98 (8th Cir. 1985); *Bettin v. Nelson*, 744 F.2d 53, 58 (8th Cir. 1984); *Willman Poultry Company v. Morton-Norwich Products*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.2d 330 (1976).

The United States Courts of Appeals for the Eleventh, Ninth, Fifth, Fourth, First and District of Columbia Circuits have all ruled, with varying degrees of conviction, that it is unnecessary for the nonmovant to comply with Rule 56(f) as a prerequisite to securing additional time to rebut a pending motion for summary judgment:

> ***Eleventh:***
>
> In this Circuit, a party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in order to invoke the protections of that Rule. *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988).

See also Dean v. Barber, 951 F.2d 1210, 1214, n.3 (11th Cir. 1992); *Fernandez v. Bankers Nat. Life Ins. Co.,* 906 F.2d 559, 570-571 (11th Cir. 1990) ("In this Circuit, however, the opposing party need not file an affidavit pursuant to Federal Rule of Civil Procedure 56(f) in order to invoke the protection of that rule. . . ."); *Burns v. Gadsden State Community College,* 908 F.2d 1512, 1519-1520 (11th Cir. 1990).

* * *

Ninth:

Program Engineering did not submit any affidavits pursuant to Fed. R. Civ. P. 56(f) or move for a continuance to allow for additional discovery. Nonetheless, we find that the motion to strike was sufficient to raise in the lower court the issue whether Program Engineering was entitled to additional discovery. *Program Engineering v. Triangle Publications,* 634 F.2d 1188, 1193 (9th Cir. 1980).

See also Westwind Seafood International, Inc. v. Anchor Frozen Foods, 1992 U.S. App. LEXIS 18415, at 4 (9th Cir. 1992) ("Although Westwind failed to comply with the affidavit requirement of Rule 56(f), we find that Westwind's Memorandum and Declaration in Opposition were sufficient to entitle it to Rule 56(f) consideration."); *Garrett v. City and County of San Francisco,* 818 F.2d 1515, 1518-1519 (9th Cir. 1987).

* * *

Fifth:

The nonmoving party's failure to tailor its request for additional discovery to fit Rule 56(f)'s precise measurements does not necessarily foreclose the court's consideration of the request. Although the preferred procedure is to present an affidavit in support of the requested continuance, so long as the nonmoving party indicates to the court by 'some equivalent statement, preferably in writing' of its need for additional discovery, the nonmoving party is deemed to have invoked the rule. *International Shortstop v. Rally's, Inc.,* 939 F.2d 1257, 1267 (5th Cir. 1991) (citations omitted).

See also Wichita Falls Office Associates v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) (en banc), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973).

* * *

Fourth:

> Although the law in some circuits is apparently to the contrary, see *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 780 n.4 (3rd Cir. 1983), the majority rule is that the nonmoving party need not file an affidavit to preserve a Rule 56(f) contention, provided that the Court is aware, through outstanding discovery requests and other filings with the Court, of the asserted need for additional discovery. . . .
>
> We agree with the courts that have held that a nonmoving party is not necessarily precluded from invoking the protection of Rule 56(f) by that party's failure to present its request by affidavit. *Phillips v. General Motors Corp.*, 911 F.2d 724 (unpublished), 1990 U.S. App. LEXIS 14276 (4th Cir. 1990).

See also Oksanen v. Page Memorial Hosp., 912 F.2d 23, 78 n.6 (4th Cir. 1990) ('Although Oksanen did not ask the district court to issue such a continuance under Rule 56(f), such a request was not required in this case where discovery had been stayed and where interrogatories already issued remained unanswered.')

* * *

First:

> An opponent of a summary judgment motion need not follow the exact letter of Rule 56(f) in order to obtain its benefits. Nevertheless, he departs from the plain language of the Rule at his peril. When a departure occurs, the alternative proffer must simulate the rule in important ways The statement must be made, if not by affidavit, then in some authoritative manner — say, by the party under penalty of perjury or by written representations of counsel subject to the strictures of Fed. R. Civ. P. 11 — and filed with the

court. *Paterson-Leitch v. Massachusetts Municipal Wholesale Elec. Co.*, 840 F.2d 985, 988 (1st Cir. 1988).

* * *

D.C.:

> Although several courts have held that filing an affidavit is necessary for the preservation of a Rule 56(f) contention, other circuits have excused the absence of a Rule 56(f) filing on the ground that other documents filed by the plaintiff — such as opposing motions and outstanding discovery requests — sufficed to alert the district court of the need for further discovery and thus served as the functional equivalent of an affidavit. . . . Given the particular facts before us, this latter, more flexible approach was the appropriate response. *First Chicago Intern. v. United Exchange Co.*, Ltd., 836 F.2d 1375, 1380 (D.C. Cir. 1988).

It is apparent that there is a serious disagreement among the circuits as to whether a party opposing summary judgment must file a Rule 56(f) affidavit to claim the benefits of that Rule. Indeed, the circuits are so confused that they even disagree on what the majority rule is. *Compare, Phillips v. General Motors Corp.*, 1990 U.S. APP. LEXIS 14276 (4th Cir. 1990) ("majority rule" is that Rule 56(f) affidavit not required); *Dowling v. City of Philadelphia*, 855 F.2d at 140 ("most courts" require filing of 56(f) affidavit). For the reasons more clearly amplified in Point IV, *infra*, the above-described split among the circuits is an important one that is fully deserving of this Court's attention. Thus, this Court should grant certiorari to resolve the differences among the circuits on the proper construction and application of Rule 56(f).

II. THERE ARE INTRA-CIRCUIT CONFLICTS AS TO THE PROPER CONSTRUCTION AND APPLICATION OF RULE 56(f).

In addition to the inter-Circuit conflicts noted above, the Fifth and Ninth Circuits have developed serious intra-Circuit conflicts on the question whether a nonmovant must comply with the requirements of Rule 56(f) to obtain additional time to discover facts "essential" to justify its opposition to summary judgment. For example, in an opinion issued just three months before the opinion in the case *sub judice*, the Fifth Circuit held that a *pro se* nonmovant's failure to file a Rule 56(f) affidavit was sufficient justification for the district court's refusal to delay ruling on a pending motion for summary judgment:

> McCallum did not submit an affidavit stating that he could not adequately respond to the government's motion for summary judgment because he needed to obtain documents through discovery. Therefore, the district court's failure to order a continuance or delay its ruling was not error. *United States v. McCallum*, 970 F.2d 66, 71 (5th Cir. 1992).

Similarly, in *Robbins v. Amoco Production Co.*, 952 F.2d 901, 907 (5th Cir. 1992), the Fifth Circuit explained that a party seeking to preserve a claim of inadequate opportunity to secure discovery "must file a motion and nonevidentiary affidavits pursuant to Fed. R. Civ. P. 56(f), explaining why it cannot oppose the summary judgment motion." It is impossible to reconcile the Fifth Circuit's rationale in *Robbins* and *McCallum* with the reasoning it applied in the case *sub judice*.[7] *See also Bernhardt v. Richardson-Merrell, Inc.*, 892 F.2d 440 (5th Cir. 1990) (Fifth Circuit upholds district

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[7] The panel in this case attempted to distinguish *Robbins*, noting that the opponent of summary judgment in Robbins had made only "vague assertions that additional discovery was needed." *App. A-8.* Petitioners respectfully submit that this is a tortured reading of *Robbins*, a case which clearly holds that a motion and supporting nonevidentiary affidavit must be filed to preserve a complaint of inadequate opportunity to conduct discovery. *Robbins*, 952 F.2d at 907. Further, Respon-

court's refusal to consider an affidavit filed by the nonmovant on the ground, *inter alia*, that the procedure authorized by Rule 56(f) "would become useless, and the summary judgment procedure uncontrolled, if a court could not enforce some limits on the timely submission of appropriate evidence.")

As regards the Ninth Circuit, several of its opinions decree that nonmovants must satisfy the requirements of Rule 56(f) if they wish additional time to take discovery necessary to refute a pending motion for summary judgment. *See, e.g., Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991) (opponent of summary judgment must invoke 56(f) by "submitting affidavits"); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 277 (9th Cir. 1988); *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) ("Rule 56(f) requires affidavits setting forth the particular facts" the party opposing summary judgment expects to secure through additional discovery); *British Airways Board v. Boeing Company*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). This, of course, is directly contrary to the opinions quoted above, *supra, p. 17*, in which the Ninth Circuit evidenced its willingness to disregard the nonmovant's failure to comply with Rule 56(f).[8]

There is also some tension in the decisions of the First Circuit. That Circuit initially indicated that the filing of a Rule 56(f) affidavit was a necessary prerequisite to securing the protections of that Rule. *Hebert v. Wicklund*, 744 F.2d 218,

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dent in this case never asserted that it required additional discovery to oppose Petitioners' motion for summary judgment.

[8] The Ninth Circuit may have staked out a middle ground, in which the nonmovant's failure to comply with Rule 56(f) "is relevant" to, but not dispositive of, the question whether the district court abused its discretion by proceeding to rule on the motion for summary judgment. *Bryant* v. *Ford Motor Co.*, 886 F.2d 1526, 1534 (9th Cir. 1989) *cert. denied*, 493 U.S. 1076, 110 S.Ct. 1126, (1990).

221-22 (1st Cir. 1984). Subsequently, in *Paterson-Leitch*, *supra*, the First Circuit announced that it was prepared to overlook the absence of an affidavit in specific circumstances. While demonstrating some flexibility on the affidavit requirement, the First Circuit continues to demand that the opponent of summary judgment make some formal, detailed plea for additional time to complete discovery. *Price v. General Motors Corp.*, 931 F.2d 162, 164 (1st Cir. 1991); *Sheinkopf v. Stone*, 927 F.2d 1259, 1263 (1st Cir. 1991) (In considering Rule 56(f) relief, "court has no duty to give a litigant more than the litigant seeks.") Thus, even assuming, *arguendo*, a nonmovant can secure relief under Rule 56(f) without filing an affidavit, the record in this case would not have warranted relief under the First Circuit's test because Respondent never requested a continuance of the proceedings on Petitioners' motion for summary judgment.

It is evident from the intra-Circuit conflicts described above and the inter-Circuit conflicts discussed in Point I, *supra*, that this Court's guidance is needed to ensure uniformity in the construction and application of Rule 56(f).

III. THE FIFTH CIRCUIT'S RATIONALE CONFLICTS WITH THE EXPRESS LANGUAGE OF RULE 56(f) AND WITH THIS COURT'S PRECEDENTS.

This Court has recently reiterated the established principle that the Federal Rules of Civil Procedure are to be given their "plain meaning." *See, e.g., Willy v. Coastal Corp.*, ___ U.S. ___, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992); *Business Guides v. Chromatic Communications Ent.*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2453, 110 L.Ed.2d 359 (1990); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989). Thus, the Court has decreed that inquiry into the meaning of a Rule begins and ends with "the text of the Rule" if the text is "clear and unambiguous." *Business Guides*, 111 S.Ct. at 928.

In this case, the Fifth Circuit conceded that Respondent never complied with Rule 56(f). *App. A-9, N.6.* Instead, it reversed the district court's summary judgment by invoking an alleged "exception" to the provisions of that Rule. Petitioners are unaware of any proposition of law that authorizes a Court of Appeals to craft an "exception" to a procedure expressly prescribed by the Federal Rules.[9] To the contrary, this Court has stated that, while the Rules may be liberally construed, they "are not to be expanded by disregarding plainly expressed limitations." *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964); *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, __ U.S. ___ , __ S.Ct. ___ , __ L.Ed.2d ___ (1993) (a change in the Federal Rules "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."). Rule 56(f) contains a plainly expressed limitation. The nonmoving party must submit an *affidavit* explaining why it "cannot for reasons stated present by affidavit facts essential to justify the party's opposition. . ." It is the filing of such an affidavit that invokes the district court's discretion under Rule 56(f).

Far from giving Rule 56(f) its "plain meaning", the Fifth Circuit has chosen, on selected occasions, to emasculate it by declaring the existence of an "exception" excusing compliance with its terms. Furthermore, the Fifth Circuit's lack of consistency in construing Rule 56(f) leaves the impression that it sometimes construes the Rule in order to achieve a desired result — not because the law demands that construction. Accordingly, this Court should exercise its supervisory power to enforce adherence to the plain provisions of this important Federal Rule of Civil Procedure. *Miner v. Atlass,* 363 U.S. 641, 651-52,

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[9] The district courts have express authority to promulgate local rules governing practice in their courts; however, these local rules may not be "inconsistent" with a Federal Rule of Civil Procedure. Fed. R. Civ. P. 83.

80 S.Ct. 1300, 1306-07, 4 L.Ed.2d 1462 (1960) (Court exercises supervisory power to strike down local rule that authorized discovery when Admiralty Rules promulgated by Supreme Court did not authorize such discovery).

The opinion below is also inconsistent with the decision of this Court in *Adickes v. Kress*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970). In that case, Justice Harlan's opinion for the Court explained that once the moving party has discharged its burden of demonstrating that there are no genuine issues of material fact,[10] the opponent of summary judgment must come forward "with either" an affidavit of the type contemplated by Rule 56(c) controverting the movant's factual showing or "an affidavit under Rule 56(f) explaining why at that time it was impractical" to require it to do so. *Adickes*, 396 U.S. at 160; *see also Celotex v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (Brennan, J., dissenting). In this case, Respondent opposed Petitioners' motion on the merits; it did not invoke Rule 56(f), request additional time to complete discovery or otherwise seek to persuade the district court to defer ruling on the motion. Accordingly, Petitioners respectfully submit that the Fifth Circuit's ruling in this case disregards both (i) this Court's precedents requiring that the Federal Rules of Civil Procedure be given their plain meaning; and (ii) this Court's reasoning in *Adickes*.

IV. THE ISSUE IS AN IMPORTANT ONE THAT SHOULD BE ADDRESSED BY THIS COURT.

In the Court of Appeals, Respondent expressed the view that the conflict among the Circuits discussed in Point I above is a trivial one not worthy of this Court's attention. To the contrary, Petitioners submit that the conflict goes to the very heart of

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[10] It is significant to note that the Fifth Circuit never questioned the district court's determination that Petitioners had discharged their burden under Rule 56(c).

modern federal summary judgment procedure, a procedure this Court recently described as an "integral part of the Federal Rules as a whole. . . ." *Celotex*, 477 U.S. at 323.

Petitioners submit that the issue is an important one for two reasons. First, as described in Point I, *supra*, this case would have had a different outcome in more than half of the other circuits; accordingly, this Court should take the case to establish uniformity in the application of Rule 56(f) throughout the federal system.

Second, subsection (f), as written, is an essential component of Rule 56; it furthers "one of the principal purposes of the summary judgment rule" by allowing the district court to isolate claims that have at least some semblance of merit and then limit discovery solely to issues relating to such claims. *Celotex*, 477 U.S. at 323. As explained by the Court in *Leatherman, supra,* federal litigants must make effective use of the Federal Rules relating to summary judgment and control of discovery to protect themselves against meritless and expensive litigation. In the Fifth Circuit and the other circuits that refuse to apply Rule 56(f) as written, the district courts and civil litigants are deprived of the effective use of the one rule specifically designed to control discovery in the context of a motion for summary judgment.

Petitioners do not dispute the proposition that a litigant must be afforded a reasonable opportunity to obtain discovery "essential" to rebut his opponent's motion for summary judgment. *See, e.g., Celotex*, 477 U.S. at 326. (noting that any problem with premature motions "can be adequately dealt with under Rule 56(f). . . ."); *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (nonmoving party's burden to adduce evidence in opposition to summary judgment "is qualified by Rule 56(f)'s provisions that summary judgment be refused where nonmoving party has not had the opportunity to discover information that is essential to his opposition."). Petitioners do contend, however, that the party opposing summary judgment is obligated to affirmatively establish its need for

additional time to gather the facts "essential" to justify its opposition to the motion.

In this regard, Rule 56(f) recognizes that the time required to develop evidence in opposition to summary judgment will vary with the nature of the case. Thus, a suit on a promissory note will probably not demand the same "opportunity" for discovery that might be appropriate in a complex antitrust case. Likewise, the existence of a bona fide affirmative defense in an otherwise complex case may dramatically reduce the scope of necessary discovery. *See, e.g., Martin v. Malhoyt,* 830 F.2d 237, 256 (D.C. Cir. 1987) (Court should not have deferred issuing dispositive ruling to allow for further discovery given "the special nature of the immunity defense. . . .").

Rule 56(f) is not a procedural trap; it serves a function that is vital to the continued utility of the summary judgment procedure. *See, e.g., Boyle v. Merrimack Bancorp, Inc.,* 756 F. Supp. 55, 59 (D. Mass. 1991). Its provisions require that the nonmovant provide the district court with a signal that the motion for summary judgment either is or is not ripe for disposition. That signal is the Rule 56(f) affidavit. If the nonmovant either fails to respond to the motion or, as in this case, responds with competing evidentiary affidavits or other materials purporting to demonstrate the existence of a genuine issue of material fact, the district court is free to reach the merits of the motion even if the motion was filed early in the case.[11] If, on the other hand, the nonmovant flags

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[11] In *Celotex,* the Court acknowledged that the motion for summary judgment has largely supplanted the motion to dismiss under modern federal "notice pleading." 477 U.S. at 327. Indeed, Rule 56(b) encourages the early filing of motions for summary judgment by authorizing defendants to seek summary judgment "at any time." Likewise, Rule 56(a) authorizes plaintiffs to move for summary judgment at any time following the lapse of twenty days from the date the action was commenced or at any time after the defendant has served a motion for summary judgment. In this case, Petitioners filed for summary judgment early in the case precisely

its need for additional discovery to obtain facts "essential" to justify its opposition by submitting a Rule 56(f) affidavit, the district court must consider whether the nonmovant's Rule 56(f) affidavit indicates that a delay is warranted and, if so, whether to restrict the scope of discovery to allow the nonmovant to secure only those facts that are "essential to justify its opposition." *First Nat. Bank v. Cities Service Co.*, 391 U.S. 253, 298, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) ("discovery attainable under Rule 56(f) would normaliy be less extensive in scope than the general discovery attainable under Rule 26. . . ."); *Boyle v. Merrimack Bancorp, Inc., supra*, 756 F. Supp. at 59 ("[I]f any continuance is allowed, it may be tailored by the Court to accomplish certain definite ends within a particular time period."); *Capital Imaging Assoc. v. Mohawk Valley Med. Assoc.*, 725 F. Supp. 669, 679 (N.D.N.Y. 1989) (Court grants relief under Rule 56(f), but limits discovery to specific areas that have the potential to create genuine issues of material fact.)

In short, Rule 56(f) serves the salutary purpose of requiring the parties and the district court to focus on the issues in dispute, if any, before additional time, attorneys' fees and judicial resources are expended in discovery relating to meritless claims. In this way, Rule 56(f) advances the overriding objective of the Federal Rules of Civil Procedure by promoting the "just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1. In an era of crowded civil dockets and increasing criticism of the lengthy delays associated with federal civil litigation, Rule 56(f), fairly applied, provides a vehicle through which the parties and the district court may dispose of completely frivolous claims, isolate any potential genuine issues of material fact and devise a discovery plan targeted precisely at the remaining material issues.

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because they believed, and continue to believe, that Respondent's Complaint fails to allege a single viable claim against either of them. Thus, Petitioners utilized the summary judgment mechanism in the manner expressly contemplated by this Court in *Celotex*.

The requirement in Rule 56(f) that the nonmovant explain its inability to respond through an *affidavit* is no mere technicality. First, the requirement that the nonmovant file an affidavit ensures that the latter is willing to swear under oath to facts justifying the delay it seeks. Thus, Rule 56(f) tests the opponent's case, at least to the extent of requiring the submission of a sworn statement describing "essential" facts which are capable of being discovered, and which, when properly presented, would justify the district court's denial of summary judgment. In essence, the Rule 56(f) affidavit functions as a road map; it explains to the district judge how the opposing party plans to defeat summary judgment and what additional discovery it requires to accomplish that objective. Informed by the affidavit, the district court is able to assess whether the opponent's hoped-for evidence will create a genuine issue of material fact and, if so, what discovery should be allowed.

Second, the presenting of an affidavit under Rule 56(f) is the act that triggers protection under Rule 56(g). If the district court grants a delay on the basis of an affidavit filed pursuant to Rule 56(f), but subsequently determines that the Rule 56(f) affidavit was presented either in bad faith or solely for the purpose of delay, Rule 56(g) requires the court to shift all costs occasioned by the delay (including attorneys fees) to the party opposing summary judgment. In the absence of a Rule 56(f) affidavit, the provisions of Rule 56(g) are not applicable. Thus, Rules 56(f) and (g) operate in tandem to protect the moving party against the expense and delay resulting from the nonmovant's filing of a Rule 56(f) affidavit premised on nothing more than rank speculation. Accordingly, courts that excuse a nonmovant's failure to file the affidavit mandated by Rule 56(f) strip the party moving for summary judgment of the important protections of Rule 56(g), and violate this Court's directive that the provisions of Rule 56 "be construed with due regard" for the rights of movants as well as nonmovants. *Celotex*, 477 U.S. at 323. They also eliminate Rule 56(g)'s use as an

incentive against frivolous requests for additional time to oppose entry of summary judgment.

The Fifth Circuit's "exception" completely destroys Rule 56(f) as an effective tool for the efficient disposition or streamlining of litigation. Indeed, its analysis is openly hostile to the very principles that Rule 56(f) seeks to promote. According to the opinion below, Respondent did not satisfy all of the requirements necessary to invoke the Fifth Circuit's "exception" to Rule 56(f) until it sought discovery eight months after the motion was ripe for disposition. *App. A-8.*[12] Thus, under the Fifth Circuit's reasoning, the district court's summary judgment was vulnerable to attack only because the district court waited too long to rule on the merits of the motion. Had the district court rendered its decision any time before April 1992, Respondent would not have succeeded in its challenge. Accordingly, under the Fifth Circuit's "exception," a dilatory nonmovant is rewarded only because the district court, charged with managing a docket no doubt clogged with equally frivolous claims, was unable to grant the motion until almost a year after it was filed. This result is nonsensical, and is antithetical to this Court's teaching in *Celotex* that the summary judgment rule is no longer to be regarded as a "disfavored procedural shortcut."

This case is a prime example of the injustice that can be worked when, without benefit of a Rule 56(f) affidavit in the record, a Court of Appeals proceeds to second guess a district

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[12] Under the Fifth Circuit's "exception," a "request" for additional discovery is timely if made any time before the district court rules on the motion. *International Shortstop*, 939 F.2d at 1267-68. Thus, it is impossible to square the Fifth Circuit's "exception" to Rule 56(f) with the provisions of Rule 56(c) requiring the opposing party to serve affidavits (including Rule 56(f) affidavits) "prior to the day of hearing . . ." or the language of Rule 56(e) providing that the district court "may permit" supplemental affidavits to be filed. *F. R. Civ. P.* 56(c).

court's determination that the party opposing summary judgment had an adequate opportunity to make its case. As reflected in its opinion, the district court disposed of virtually all of Respondent's claims because they lacked any basis in law — not because of inadequate factual development.[13]

For example, the district court granted summary judgment dismissing Respondent's claim for breach of an alleged implied duty of good faith and fair dealing because, as a matter of Texas law, no such duty exists. *App. B-6; B-7.* If no such duty exists, it is axiomatic that additional discovery will not generate a genuine issue of material fact.

Similarly, the district court disposed of Respondent's breach of contract claims without resorting to anything more than the language of the pertinent documents. Respondent argued that it was a third-party beneficiary of the P&A Agreement, and contended that it was entitled to enforce the provisions of that Agreement against Petitioners. The district court held that, as a matter of law, the language of the completely integrated P&A Agreement excluded the possibility that Respondent could ever successfully claim that it was a third-party beneficiary of that contract. *App. B-12; B-13.* The Fifth Circuit never took issue with that conclusion of law.

Alternatively, Respondent pressed a claim for breach of contract premised on the theory that a letter sent by a Vice President

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[13] Since the Fifth Circuit never challenged the correctness of the district court's legal analysis, it is difficult to perceive how additional factual development will change the result in this case. While the Fifth Circuit identified certain areas of inquiry it deemed relevant to Petitioners' summary judgment motion, it never explained how the accumulation of the additional information on remand could potentially alter the original result. Indeed, Petitioners argued below, and still contend, that no amount of additional discovery will create a genuine issue of material fact with respect to any of Respondent's claims because the district court's legal analysis was correct.

of Petitioner Banc One Corporation, was a contract. The district court characterized this argument as "wishful thinking." *App. B-13.* The Fifth Circuit did not disagree, and for good reason. Respondent's Complaint affirmatively pled that Petitioners had *not* entered into a consensual relationship with Respondent. Instead, Respondent alleged that Petitioners had "unilaterally determined" to remain on the premises. Thus, no contract theory was ever viable.

As for the tortious interference counts, Respondent never challenged the propriety of the district court's analysis and disposition of those counts in the Fifth Circuit. Furthermore, as the district court explained, Respondent was unable to identify even one prospective business relationship that was the subject of Petitioner Banc One Corporation's alleged interference. *App. B-8.* To satisfy Rule 11, facts of that sort would have had to have been within Respondent's knowledge before the suit was ever filed; nevertheless, Respondent's affiant, Mr. Pardue, was unable to identify any prospective business relationship as the subject of its claim.

In short, the Fifth Circuit reversed a fully substantiated summary judgment without any justification and remanded the case to the district court to allow Respondent to commence taking depositions and demanding documents for purposes that no one has yet been able to articulate. This Court should grant certiorari not only to resolve the circuit conflicts and enforce adherence to the plain terms of the Federal Rules of Civil Procedure, but also to uphold the important policies underlying Rule 56 and to protect Petitioners from an injustice that derives solely from the Fifth Circuit's deliberate refusal to apply Rule 56(f).

CONCLUSION

For all the foregoing reasons, Petitioners Banc One Corporation and Bank One, Texas, N.A. respectfully request that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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Appendix A

A.

OPINION AND JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT,
DECEMBER 4, 1992

Appendix A

WICHITA FALLS OFFICE ASSOCIATES, Plaintiff-Appellant,

v.

BANC ONE CORPORATION, *et al.*, Defendants,

BANC ONE CORPORATION AND BANK ONE, TEXAS, N.A., Defendants-Appellees.

No. 91-7303.

United States Court of Appeals, Fifth Circuit.

Dec. 4. 1992

Before Reynaldo G. Garza and Garwood, Circuit Judges and Rosenthal, District Judge.

Reynaldo G. Garza, Circuit Judge:

Wichita Falls Office Associates ("WFOA") commenced suit against Banc One Corporation and Bank One, Texas, N.A. (collectively "Banc One") in order to determine their respective rights under an office building lease. The district court granted summary judgment to the defendants. Because the district court prematurely terminated discovery we REVERSE and REMAND.

I. FACTS

On November 30, 1983, WFOA, as owner/lessor entered into a complex sale-leaseback transaction with lessee MBank Wichita Falls, N.A. ("MBank"). Pursuant to the transaction, WFOA financed its acquisition of the property with a loan from MBank conveying in return a nonrecourse note. Further, WFOA granted a lien to MBank on the property and the lease payments themselves. MBank had total dominion and control of the building under the lease.[1]

In March of 1989, MBank was declared insolvent and placed into an FDIC receivership. The FDIC transferred most of MBank's assets to The Deposit Insurance Bridge Bank ("DIBB"). DIBB entered into a Purchase and Assumption Agreement ("P & A Agreement") with the FDIC and took over many different MBanks including MBank Wichita Falls.

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[1] MBank was responsible for all aspects of the building including: (i) security; (ii) access; (iii) maintenance; (iv) taxes; and (v) insurance.

In the summer of 1989, Banc One Corporation of Ohio ("Banc One") assumed management of DIBB and purchased all the DIBB stock. Banc One succeeded to DIBB's obligations under the P & A Agreement with the FDIC. After Banc One purchased DIBB it changed the name to Bank One, Texas, N.A. ("Bank One").

Section 4.4(a) of the P & A Agreement gave DIBB and successor bank the option to accept an assignment from the Receiver of any lease agreements. Further, Banc One had a fixed period of time in which to decide whether or not to maintain the leased premises now occupied by Bank One. Whenever, Banc One decided to abandon a lease, the FDIC sent a letter of disaffirmance with an effective termination date. Pursuant to Section 4 of the P & A Agreement, Banc One was obligated to pay rent during the transitional period of evacuation. Further, the P & A agreement provided that the full contract rent was to be paid directly to the "lessors of the buildings leased by the failed MBanks" during these transitional periods.

On September 12, 1989, Banc One indicated to WFOA that it intended to vacate the leased premises. On the same day, Banc One's Vice president, Thomas Rainey, wrote a letter (the "Rainey Letter"), which notified WFOA of Banc One's intent to disaffirm the lease, vacate the premises, and abide by the terms of the lease in the interim. The letter provided no exact departure date, and in fact, Bank One did not vacate the building until 15 months later. The exact rent due to WFOA from Banc One for those fifteen months is the crux of the current controversy.

Although the facts are disputed, it appears that Banc One paid only a pro-rata portion of the rent for the transitional period, based upon the amount of space it occupied in relation to the original lease. Further, it is alleged that Banc One failed to adequately comply with its duties under the lease such as paying insurance, taxes and utilities. It is also alleged that Banc One

abandoned numerous maintenance contracts and business relationships that were vital to the leased premises.

II. PROCEEDINGS

On November 14, 1989, WFOA filed its complaint in the Wichita Falls Division of the Northern District of Texas. In late January 1990, before any discovery had taken place, Banc One filed a motion to dismiss or, alternatively, to transfer venue. The motion to dismiss was denied; however, the motion to transfer venue was granted, which transferred the case to the Dallas Division.

Banc One then filed a second motion to dismiss for failure to state a claim or, alternatively, for summary judgment. On July 31, 1990, while the district court was considering the pending motion, WFOA filed a motion for preliminary injunction prohibiting Banc One from vacating the building. WFOA also sought to obtain discovery of both Banc One and the FDIC in connection with the pending motion.

On August 22, 1990, WFOA filed a motion for consolidation of the defendant's motion and plaintiff's preliminary injunction motion. In support of the motion for consolidation, WFOA submitted two affidavits by Mr. David Pardue, and recent deposition testimony of Mr. Bobby Hathaway, Senior Vice President of Bank One.

At his deposition, Hathaway was unable to recall many aspects and events relating to documents that he had written regarding Banc One's lease obligations. In addition, Pardue's affidavits confirmed under oath the WFOA allegations.

In April of 1991, WFOA served extensive discovery requests upon the banks.[2] WFOA sought the deposition of Mr. Rainey, the

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[2] The cutoff date for discovery had been pushed back a number of times in early 1991 because of pending settlement negotiations with the

author of the Rainey letter, and many other individuals said to have knowledge about the leased premises. WFOA made specific reference in their 30(b)(6) notices that they sought testimony regarding: (i) Section 4.4(d); (ii) the amount of rent due during the transition period; and (iii) whether the lease bound Banc One. Further, in document requests WFOA sought all communications regarding the disputed rent in Wichita Falls and any documents relating to Section 4.4 of the P & A Agreement.

On April 22, 1991, Banc One moved for a protective order from this barrage of discovery. On April 23, 1991, Magistrate Tolle, conducted a hearing by telephone to consider the motion. At the conclusion of the hearing the magistrate denied Banc One's motion. On May 6, 1991, The banks appealed the magistrate's determination.

On June 4, 1991, the district court granted the bank's motion for a protective order cutting off all discovery sought by WFOA. Subsequently, on June 6, 1991, the district court granted the bank's summary judgment motion on all of WFOA's claim. WFOA appeals.

III. DISCUSSION

WFOA appeals the district court's order principally on three grounds: (i) discovery was improperly cut off; (ii) summary judgment on WFOA's breach of contract claim was erroneously granted; and (iii) summary judgment was improperly granted on WFOA's good faith and fair dealing claim.

Discovery Cut Off

[1] The trial judge's decision to curtail discovery is granted great deference and, thus, is reviewed under an abuse of discretion

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FDIC. The parties were awaiting the final settlement with the FDIC because the nature of this litigation depended upon the settlement agreement.

standard. *See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990); *Corwin v. Marney, Orton Invs.*, 843 F.2d 194, 200 (5th Cir.), *cert. denied*, 488 U.S. 924, 109 S.Ct. 305, 102 L.Ed.2d 324 (1988).

WFOA contends that discovery was improperly terminated because it was not given a reasonable opportunity to present all evidence relevant to the summary judgment motion. *See Fed.R.Civ.P.* 12(b)(6). The banks counter WFOA's position asserting that: (i) WFOA was dilatory because it sought no discovery for nine months after the summary judgment motion was filed; (ii) WFOA never showed how the requested discovery would support its opposition to the bank's summary judgment motion; and (iii) WFOA did not file a formal Rule 56(f) motion seeking additional time for discovery.[3]

WFOA, in response to the banks, asserts that it filed the functional equivalent of a Rule 56(f) motion and that it reasonably delayed its discovery requests pending the outcome of settlement negotiations with the FDIC. Furthermore, WFOA asserts that it set forth in detail before the district court the reasons for its discovery.

[2,3] The purpose of Rule 56(f) is to provide non-movants with a much needed tool to keep open the doors of discovery in order to adequately combat a summary judgment motion.[4] Al-

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[3] Fed.R.Civ.P. 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Id.

[4] Such "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course" unless "the

though it is preferred that non-movants present an affidavit to support a continuance of discovery, there is no stringent procedure that will bar litigants access to further discovery. In order to trigger the rule non-movants need only submit an "equivalent statement preferably in writing" that conveys the need for additional discovery. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (*citing Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) (en banc), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973)).

[4,5] Three general requirements can be elicited from *International Shortstop* that the non-movant must establish for a continuance of discovery: (i) requesting extended discovery prior to the court's ruling on summary judgment; (ii) put the trial court on notice that further discovery pertaining to the summary judgment motion is being sought; and (iii) demonstrating to the trial court specifically how the requested discovery pertains to the pending motion. *International Shortstop*, 939 F.2d at 1268. Additionally, the non-movant must diligently pursue relevant discovery — the trial court need not aid non-movants who have occasioned their own predicament through sloth. *See id.* at 1267.

The banks argue that WFOA was dilatory because they waited nearly a year to request discovery that they themselves admit is crucial to their claim. Further, the banks point out that they filed the same motion in the Wichita Falls Division fifteen months before summary judgment was ultimately granted. Consequently, they argue that WFOA was on notice for well over a year as to what issues they needed discovery on. We find that WFOA was not dilatory because they reasonably awaited the outcome of pending negotiations with the FDIC.

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non-moving party has not diligently pursued discovery of the evidence." *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (citations omitted), *cert. denied*, — U.S. —, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992).

The banks next contend that WFOA's failure to file a formal Rule 56(f) motion precludes the trial court from granting a continuance. The banks rely on *Robbins v. Amoco Prod. Co.*, 952 F.2d 901, 907 (5th Cir. 1992). *Robbins* does appear to say that affidavits must be filed in order to preserve the right to a continuance. However, *Robbins* did conclude that the non-movant made only vague assertions that additional discovery was needed. *See id.* Therefore, the non-movant in *Robbins* ran afoul of the third prong in *International Shortstop*. Consequently, it is easy to reconcile *Robbins* with *International Shortstop*.

WFOA argues that its joint requests for extended discovery deadlines constituted a Rule 56(f) motion. These two requests, which were granted, certainly establish the first prong of *International Shortstop;* however, they do not put the court on notice or explain specifically how the discovery is relevant.

WFOA did specify its intended subject matter in its request for supplemental depositions and in document requests that it sought information regarding: (i) Section 4.4(d) of the P & A Agreement; and (ii) the amount of rent due to WFOA. Unquestionably, these requests related directly to the pending summary judgment motion. Significantly, Magistrate Tolle, denied the defendant's motion for a protective order concluding that WFOA was entitled to the requested discovery.[5]

[6] It is clear that the non-moving party may not rely merely on vague assertions that discovery will produce some unrelated, unspecified facts. *See, e.g., SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 900 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082, 101 S.Ct. 866, 66 L.Ed.2d 806 (1981). However, when a party is

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[5] This fact has been considered relevant in finding an abuse of discretion for failing to extend discovery under Rule 56(f): "[t]hat the contemplated discovery was material to the summary judgment motion is confirmed by the magistrate judge's ruling in favor of [the non-movant] on the discovery matters." *International Shortstop*, 939 F.2d at 1268.

seeking discovery that is germane to the pending summary judgment motion it is inequitable to pull out the rug from under them by denying such discovery.

[7] The amalgam of WFOA's actions did put the trial court on notice that it sought discovery regarding the Rainey letter, the bank's calculation of rent, interpretive documents relating to Section 4.4(d), and the bank's policy on disaffirmance.[6]

These issues were germane to the pending summary judgment motion and therefore the stay was improvidently granted. While we are generally reluctant to substitute our judgment for that of the district court, we think it wiser for the district court to defer its summary judgment determination until after WFOA has had a chance to obtain its requested discovery.

IV. CONCLUSION

Because we find that the district court improperly curtailed discovery we do not address the summary judgment contentions. We REVERSE and REMAND.

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[6] We emphasize that the general rule requires substantial compliance with Rule 56(f), *See Robbins*, 901 F.2d at 907 and cases cited, and that *International Shortstop* presents a very narrow exception to that rule. It is the unique facts of this case, taken as a whole, that bring it within that narrow exception. Further, we strongly urge future litigants to file a formal Rule 56(f) motion in the district court when they seek additional discovery while a summary judgment motion is pending.

Appendix B

B.

MEMORANDUM OPINION AND ORDER
OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION,
June 5, 1991

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES, *Plaintiff.* v. BANC ONE CORPORATION, *et al.*, *Defendants*	C.A. No. 3-90-1301-H

MEMORANDUM OPINION AND ORDER

Before the Court are the Second Motion to Dismiss for Failure to State a Claim or, Alternatively, for Summary Judgment of Defendants Banc One Corporation and Bank One Texas, N.A. (collectively the "Bank One Defendants"), filed June 22, 1990; the Response of Plaintiff Wichita Falls Office Associates, ("WFOA") filed July 27, 1990; and the Bank One Defendants' Reply, filed August 17, 1990. Because the Bank One Defendants have presented factual evidence that goes beyond the pleadings, the Court deems their present motion to be, and treats it as, a motion for summary judgment, as they have pleaded it in the alternative.

For the reasons stated below, the Bank One Defendants' motion for summary judgment is GRANTED.

I. Facts.

At the core of this case is Plaintiff WFOA's challenge to the FDIC's power to selectively disaffirm a master net lease (the "Net Lease") and two ground leases (the "Ground Leases") concerning an office building in Wichita Falls, Texas. WFOA characterizes the deal underlying this lawsuit as a "complex,

bilateral sale-leaseback transaction . . . ." Plaintiff's Complaint ¶ 1. The essence of the transaction is fairly straightforward. MBank Wichita Falls ("MBank" or "MBankWF") sold the building to WFOA and also provided WFOA with financing for the building's acquisition by loaning WFOA $12,300,000. WFOA then leased the building back to MBank and another lessee, Mercantile Texas Corporation. Accordingly, MBank was the seller of the Building, the lender providing the financing of the sale under the terms of the Note, and a lessee providing funds to WFOA for payments under the Note. As described in WFOA's Complaint, its financial agreement with MBank had three parts:

> (i) a sale of MBankWF's property in downtown Wichita Falls (the "Property") to plaintiff; (ii) a simultaneous lease of the property from plaintiff to MBankWF; and (iii) a loan from MBankWF to plaintiff for $12.3 million which was secured by a first mortgage on the Property and was non-recourse against plaintiff and the individual partners of plaintiff.

The Net Lease of the building and the promissory note (the "Note") were both executed on November 30, 1983. As just mentioned, the Note was a nonrecourse note to both WFOA and WFOA's partners, and to secure payment of the Note WFOA granted MBank a lien on the Property and the payments due under the Lease.

Given the nature of the sale-leaseback transaction, a great deal depended on the continued vitality of the lender and lessee, MBank. Alas, on March 28, 1989 the Comptroller of the Currency declared MBank insolvent and appointed the FDIC its receiver. The same day, the FDIC/Receiver sold almost all of the assets of the defunct MBank to the Deposit Insurance Bridge Bank, the predecessor of Defendant Bank One Texas, N.A., pursuant to the terms of a Purchase and Assumption Agreement between the FDIC/Receiver and the Bridge Bank.

Excluded from this sale of assets was the "Leased bank Premises" of the former MBank,[1] although the Purchase and Assumption Agreement did give the Bridge Bank 120 days in which to determine whether it wished to accept an assignment from the FDIC/Receiver of any of the lease agreements for the Leased Bank Premises. Bank One Texas decided not to exercise this option under the Purchase and Assumption Agreement, nor did it accept an assignment of the Ground Leases relating to the Property leased by MBank pursuant to the Net Lease.

The FDIC/Receiver subsequently disaffirmed the Net Lease and the Ground Leases, prompting WFOA to file this lawsuit in the United States District Court for the Northern District of Texas, Wichita Falls Division. WFOA's first cause of action seeks declaratory and injunctive relief against each of the Defendants to prevent enforcement of the Note. By its second cause of action, WFOA seeks a declaration that the FDIC/Receiver's disaffirmance of the Net Lease is invalid, ordering the disaffirmance rescinded, declaring the Net Lease in full force and effect, and preventing the FDIC/Receiver from disaffirming it again. WFOA's third cause of action seeks an order rescinding the FDIC/Receiver's disaffirmance of the Ground Leases and a declaration that they remain in effect. The fourth cause of action is against Banc One Corporation for a breach of a purported duty of good faith and fair dealing it owed WFOA. By its fifth cause of action WFOA charges Bank One Corporation with tortious interference with WFOA's existing and prospective contractual relationships by causing the FDIC to disaffirm the leases at issue here. WFOA's sixth and final cause of action is against the Bank One Defendants for breach of contract.

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[1] The "Leased Bank Premises" are defined in Section 1.10 of the Purchase and Assumption Agreement as "the banking houses, drive-in banking facilities and teller facilities (staffed or automated) together with appurtenant parking, storage and service facilities leased by the Failed bank as of Bank Closing."

The case was transferred to this Court on May 29, 1990 pursuant to 28 U.S.C. §1406(a) because the Wichita Falls court found that a mandatory venue selection provision in the Note at issue in the case validly selected the Dallas Division of the Northern District of Texas as the forum of proper venue for this action. The same day the case was transferred to the Dallas Division, the Wichita Falls court denied motions by the Defendants to dismiss the case. The motions to dismiss were brought pursuant to Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction), 12(b)(3) (improper venue), and 12(b)(6) (failure to state a claim upon which relief can be granted). The court found that it had jurisdiction over the Plaintiff's claims of denial of due process and of arbitrary and capricious administrative action, and "express[ed] no opinion on the balance of Plaintiff's claims or Defendants' remaining motions." Order entered May 29, 1990.

After the case was transferred to this Division, the FDIC/Receiver filed a motion for renewal or for reconsideration of its Rule 12(b)(6) motion to dismiss, which will be decided by separate Order. The Court now turns to the Bank One Defendants' motion for summary judgment on WFOA's three state law claims against them.

IV. Summary Judgment.

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. As the Fifth Circuit stated in *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362, 364 (5th Cir. 1990), "[b]efore a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the plaintiff's case." A movant for summary judgment need not support the motion with evidence

negating the opponent's case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

"Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1197 (5th Cir. 1986) (reinterpreting Federal Rule of Civil Procedure 56 to enhance judicial economy). The Fifth Circuit has held that the moving party is entitled to summary judgment when the nonmoving party fails to make a sufficient showing of proof, *see id.* at 195-98, although all evidence must be viewed in the light most favorable to the motion's opponent. *See Gremillion v. Gulf Coast Catering Co.,* 904 F.2d 290, 292 (5th Cir. 1990). Summary judgment may be entered against a party if after adequate time for discovery the party fails to establish the existence of an element essential to his or her case and as to which he or she will bear the burden of proof at trial. *See Celotex Corp. v. Catrett,* 477 U.S. at 324-26.

Finally,

> the party with the burden of proof, the Plaintiff in this case, who opposes a motion for summary judgment must point out specific facts showing that there is a genuine issue for trial. Factual specificity is required because summary judgment is designed to go beyond the pleadings in order to assess the proof and ascertain whether a claim is baseless and should be dismissed or, alternatively, whether a genuine fact issue exists and trial is necessary. Because the opponent of a summary judgment motion must designate specific facts, it is not enough that he merely restate his claims — general allegations and self-serving conclusions unsupported by specific facts are not adequate.

Castillo v. Bowles, 687 F. Supp. 277, 280 (N.D. Tex. 1988), *cert. denied,* 110 S. Ct. 92 (1989) (citations omitted).

III. Good Faith and Fair Dealing.

The Bank One Defendants move for summary judgment on WFOA's claim against them for allegedly breaching a duty of good faith and fair dealing owed to WFOA.

"The duty of good faith and fair dealing does not exist in Texas unless intentionally created by express language in a contract or unless a special relationship of trust and confidence exists between the parties to the contract." *Lovell v. Western National Life Insurance Co.*, 754 S.W.2d 298, 302 (Tex. App. — Amarillo 1988, writ denied), *citing Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165, 167 (Tex. 1987); *see Texas National Bank v. Sandia Mortgage Co.*, 872 F.2d 692, 698 (5th Cir. 1989) (applying Texas law and distinguishing the duty of good faith and fair dealing from other actions sounding in contract); *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983) (expressly rejecting contention that implied duty of good faith and fair dealing exists in every contract); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962) (describing confidential relationship giving rise to duty of good faith and fair dealing as either a fiduciary relationship or a more formal relationship arising from moral, social, domestic, or personal relationships); *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 819-20 (Tex. App. — Houston [14th Dist.] 1988) (refusing to acknowledge typical contractual relationships of vendor-purchaser, lessor-lessee, and lender-borrower as special relationships giving rise to the duty of good faith and fair dealing), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989).[2]

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[2] The Court notes that the Uniform Commercial Code, Tex. Bus. & Com. Code Ann §1.203 (Vernon 1968), imposes upon every contract under its ambit the obligations of good faith and fair dealing. That general duty applies, however, only to transactions in goods. *See id.* §2.102. Accordingly, the UCC is of no help to Plaintiff so far as this issue is concerned.

WFOA's contention in its Complaint, *see* Complaint ¶¶ 100, 101, that a special relationship of trust and confidence existed between the parties giving rise to a duty of good faith and fair dealing is just wind, and apparently has been abandoned because WFOA's Response discusses a very different relationship. WFOA's present argument is based on an unsubstantiated belief that under Texas law an alleged imbalance of bargaining power between the parties, when coupled with Banc One's possession of the Property, can create the required special relationship for a good faith and fair dealing claim.

There are two problems with WFOA's argument. First, in Texas "an imbalance of bargaining power is limited to an imbalance of bargaining power conferred upon the parties by the terms of the contract with respect to performance or enforcement and not with respect to original formation of the contract." *City of San Antonio v. Forgy*, 769 S.W.2d 293, 297 (Tex. App. — San Antonio 1989, writ denied). WFOA cannot point to a single feature of a contract with the Bank One Defendants that meets this standard.

Second, there is absolutely no authority for the contention that Banc One's possession of the Property can create a special relationship giving rise to a duty of good faith and fair dealing. It would require a radical extension of Texas tort law for the Court to find a special relationship between the parties on the facts of this case. Furthermore, there is absolutely no suggestion in Texas property law that the lessor-lessee relationship is a special relationship giving rise to the duty of good faith and fair dealing.

Accordingly, the Bank One Defendants' motion to dismiss Plaintiff's claim of breach of the duty of good faith and fair dealing is hereby GRANTED.

IV. Tortious Interference With Business Relationships.

WFOA's fifth cause of action against the Bank One Defendants is for tortious interference with existing and prospective contractual relationships. The Court addresses the claim for interference with existing contracts first.

> To establish liability for tortious interference with contract of another party, Texas common law requires the existence of a contract; an intentional and knowing interference by the defendant that proximately causes actual injury to the plaintiff; and an absence of legal right or legal justification that would excuse the defendant's actions.

Whitehall Corporation v. Western Geophysical Co., 664 F. Supp. 1056, 1075 (S.D. Tex. 1986), *citing Black Lake Pipe Line Co. v. Union Construction Co.*, 538 S.W.2d 80, 91 (Tex. 1976); *Armendariz v. Mora*, 553 S.W.2d 400, 404 (Tex. Civ. App. — El Paso 1977, writ ref'd n.r.e.); *see Hi-Line Electric Co. v. Dowco Electrical Products*, 765 F.2d 1359, 1362 (5th Cir. 1985) (reciting Texas law and adding the element of actual damages to the cause of action).

In the present case, WFOA contends that Banc One interfered with WFOA's existing contractual relations by requiring the FDIC to breach selected parts of the Sale-Leaseback Agreement underlying this lawsuit. WFOA states that "Banc One directed and explicitly *required* the FDIC to break selected parts of MBankWF's Sale-Leaseback Agreement with WFOA." Plaintiff's Response at 21. As the Bank One Defendants properly point out, to accept this argument one must accept WFOA's self-serving conclusion that Bank One had the power to control the FDIC, an agency of the federal government. *See* Banc One's Reply at 5. Not only is this an unsubstantiated conclusion but, more to the point in the context of a summary judgment motion, WFOA fails to produce specific facts showing Banc One possessed the power to control the FDIC and exercised such power. "Because the opponent of a summary judgment motion must

designate specific facts, it is not enough that he merely restate his claims — general allegations and self-serving conclusions unsupported by specific facts are not adequate." *Castillo v. Bowles*, 687 F. Supp. at 280.

WFOA's entire argument on this point rests on the fact that a Banc One Vice President filled out a series of forms entitled "FDIC Action Request," and part of each form contained a section entitled "Action Required" by the FDIC. *See* Plaintiff's Response at 21; *Id.* Ex. 3. Nothing in these documents suggests that Banc One could control the FDIC, and the only logical way to read them is to understand the "Action Required" as action required to fulfill the terms of the "Action Request".

Accordingly, the Court finds that the Bank One Defendants have met their summary judgment burden on this point and that WFOA's claim for tortious interference with existing contractual relationships must fail as a matter of law.

WFOA also alleges that the Bank One Defendants interfered with prospective business relationships. *See* Complaint ¶¶103-115. The Fifth Circuit has articulated the elements of this cause of action under Texas law.

> For a plaintiff . . . to prevail, he must show that (1) there was a 'reasonable probability' that he would have entered into a contractual relationship; (2) defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming plaintiff; (3) the defendant was not privileged or justified, and (4) actual harm or damage occurred as a result.

Deauville Corp. v. Federated Department Stores, Inc., 756 F.2d 1183, 1196 (5th Cir. 1985) (applying Texas law), (quoting *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, 516 F.2d 952, 956 (5th Cir. 1975), and citing *Light v. Transport Insurance Co.*, 469 S.W.2d 433, 439 (Tex. Civ. App. — Tyler 1971, writ ref'd n.r.e.)).

WFOA's entire defense to the Bank One Defendants' motion for summary judgment on this point rests on Paragraph 7 of the

affidavit of David Pardue, a general partner of WFOA. *See* Plaintiff's Response at 21-22. That Paragraph reads in full as follows.

> 7. The effect of the communications from Banc One and its agent at the time, Commercial Real Estate Associates ("CREA") to WFOA's subtenants in its building — to the effect that the subtenants no longer had leases to remain in the Building due to the disaffirmance of the Master Net Lease — has been to greatly destabilize the Building, threaten its viability, cause subtenants to plan to vacate the Building when Banc One vacates, impede greatly WFOA's ability to attract new tenants, and greatly interfere with WFOA's ability to renew leases with those tenants whose leases were purportedly terminated by Banc One. The letter to Banc One's agent to tenants is attached as Exhibit 2. For example, there have been two or three prospective tenants to whom WFOA had a reasonable probability of leasing space, who were deterred from entering the agreements with WFOA by the clouded status of the Building due to Banc One's actions.

Exhibit 2 to the Pardue affidavit, referred to in Paragraph 7, reads in pertinent part as follows.

> We have been advised by the FDIC that the lease for MBank space at 718 Scott — Main Tower will be disaffirmed by the end of September, 1989.
>
> In effect, this action automatically will terminate all subleases and assignments such as yours under the MBank lease. The FDIC has paid rental under the terms of the MBank lease through September 30, 1989, therefore any payments due from your firm *prior to September 30, 1989* should be made as usual.
>
> You will be contacted in the near future to discuss your continued occupancy.

The Court is at a loss to see how the letter attached to Exhibit 2 to the Pardue affidavit supports a cause of action for tortious interference with prospective contractual relations. First, this letter was sent to existing tenants of the Building, and there is absolutely no evidence that it was sent to or otherwise shown to prospective tenants by the Bank One Defendants. Second, there is

nothing in the letter that appears to be false or misleading or in any way suggests malice on the part of the Bank One Defendants. Indeed, the letter is an entirely proper warning to tenants of a substantial and important change in the status of their leaseholds. Third, there is no suggestion in the letter that it was sent with the intent to interfere with prospective contractual relationships.

Furthermore, the self-serving conclusions of the Pardue affidavit simply are incompetent summary judgment evidence. Pardue does not identify a single person or entity with whom there was a reasonable probability he would have entered a contractual relationship — the threshold element of this cause of action. WFOA apparently was unable to obtain a simple affidavit from a single prospective tenant stating that it did not lease space because of "the clouded status of the Building". As the Court has already stated, "general allegations and self-serving conclusions unsupported by specific facts are not adequate" to defeat a motion for summary judgment. *Castillo v. Bowles*, 687 F. Supp. at 280.

Finally, WFOA has not established, or even offered any evidence indicating, that CREA was Banc One's agent. By the terms of the letter quoted above, it appears that if CREA acted on behalf of any party it was the FDIC, who advised CREA of the impending disaffirmance.

In short, WFOA's fifth cause of action for tortious interference with existing and prospective contractual relations must fail as a matter of law. Accordingly, the Bank One Defendants' motion for summary judgment on this claim is GRANTED.

IV. Breach of Contract.

WFOA's final cause of action against the Bank One Defendants is for breach of contract. The contract claim is based on Section 4.4(d) of the Purchase and Assumption Agreement and a letter sent from Tom Rainey, Vice President of Banc One Corporation, to Mr. Pardue of WFOA. According to WFOA, by these two documents Bank One committed to continue to abide

by the terms of the Net Lease even though Bank One refused to accept an assignment from the FDIC/Receiver of any of the lease agreements for the Leased Bank Premises. *See* Plaintiff's Response at 22-23. In short, even though the terms of the contract that the Bank One Defendants are accused of breaching are contained in the Net Lease, the agreement creating that contract must be found in the Purchase and Assumption Agreement or the Rainey letter. *See* Plaintiff's Response Ex. 2 (Plaintiff's Opposition to Defendants' Motions to Dismiss the Complaint, filed March 21, 1990), at 54 (stating that "Banc One and Bank One Texas have breached their contract to abide by the terms of the Master Net lease."); Plaintiff's Complaint ¶¶118, 122 (citing the Rainey Letter and alleging that "Defendants have . . . breached their contractual obligations to plaintiff to comply with all of the provisions of the master net lease for so long as they hold over and occupy the premises"). WFOA's argument is without merit.

First, the Purchase and Assumption Agreement is of no use to WFOA because the only parties to that Agreement were Bank One Texas and the FDIC/Receiver. Obviously, WFOA cannot base any breach of contract claim upon a contract to which it is not a party unless it is a third party beneficiary pursuant to the terms of the contract. Under Texas law, in order to prove that one is a third party beneficiary the party must prove that the promisee under the contract intended to benefit the party when the promisee entered into the contract. *See Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503-04 (Tex. 1975) (stating that "we must begin with the presumption that parties contract for themselves, and a contract will not be construed as having been made for the benefit of third parties unless it clearly appears that such was the intention of the contracting parties"). In order to decide this matter, a court should look primarily to the contract itself. *See Republic National Bank v. National Bankers Life Insurance Co.*, 427 S.W.2d 76, 79 (Tex. Civ. App. — Dallas 1968, writ ref'd n.r.e.) (discussing the "elementary rule of law that privity of contract is an essential element of recovery in an action based on

contractual theory" and stating that the "cardinal rule" of contract construction is that the intent of the parties is "disclosed within the four corners of the instrument, which should control"). In the present case, the Purchase and Assumption Agreement expressly disclaims any intention of the parties to benefit third parties.

> Subject to the limitations of Section 12.6 of this Article XII, all terms and conditions of this Agreement shall be binding on the successors and assigns of the Receiver and the Assuming Bank. Except as otherwise specifically provided in this Agreement, nothing expressed or referred to in this Agreement is intended or shall be construed to give any Person other than the Receiver, the Corporation and the Assuming Bank any legal or equitable right, remedy or claim under or in respect of this Agreement or any provisions contained herein, it being the intention of the parties hereto that this Agreement, the obligations and statements of responsibilities hereunder, and all other conditions and provisions hereof are for the sole and exclusive benefit of the Receiver, the Corporation and the Assuming Bank and for the benefit of no other Person. It is specifically understood and expressly agreed that the Corporation is an intended third party beneficiary of this Agreement and may enforce the Assuming Bank's obligations to the Corporation hereunder directly and without the need for any consent, assistance or intervention of the Receiver.

Purchase and Assumption Agreement §12.5, at 38. In light of this language, WFOA cannot base its contract claim on the Purchase and Assumption Agreement.

As far as the Rainey letter is concerned, it is obvious that it is not a contract and does not provide the basis for a contract claim against the Bank One Defendants. The Court agrees with the Bank One Defendants that WFOA's position on this issue "falls under the category of wishful thinking."[3] Bank One's Reply at 10.

---

[3] The Court also notes the fact that although WFOA calls Bank One a holdover tenant, it did not try to evict Bank One but actually unsuccessfully moved the Court for injunctive relief forcing Bank One to remain in the Building.

Accordingly, WFOA's breach of contract claim against the Bank One Defendants must fail as a matter of Law. The Bank One Defendants' motion for summary judgment on Plaintiff's breach of contract claim is GRANTED.

V. Conclusion.

For the reasons stated above, the Motion for Summary Judgment of Defendants Banc One Corporation and Bank One Texas, N.A., filed June 22, 1990 is GRANTED and Plaintiff Wichita Falls Office Associates' fourth, fifth, and sixth causes of action against Defendants alleging breach of the duty of good faith and fair dealing, tortious interference with existing and prospective contractual relations, and breach of contract are hereby DISMISSED with prejudice.

SO ORDERED.

DATED: June 5, 1991.

/s/ BAREFOOT SANDERS

Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

Appendix C

C.

ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION,
GRANTING BANK ONE DEFENDANTS'
MOTION FOR ENTRY OF FINAL JUDGMENT
PURSUANT TO RULE 54(b)
OCTOBER 24, 1991

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES, *Plaintiff.* v. BANC ONE CORPORATION, BANK ONE TEXAS, N.A. and THE FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity and in it's capacity as Receiver of MBank-Wichita Falls, *Defendants.*	CIVIL ACTION No. 3-90-1301-H

ORDER GRANTING BANK ONE DEFENDANTS' MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b)

On the 24th day of October, 1991, the Court considered the Motion of Defendants Banc One Corporation and Bank One Texas, N.A., pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, for entry of final judgment as to each of the claims asserted against either of them by Plaintiff Wichita Falls Office Associates; and the Court being of the view that the motion is well taken;

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The Court finds that there is no just reason for delay in entering final judgment dismissing each of Plaintiff Wichita Falls Office Associates' claims against Bank One Texas, N.A. and/or Bank One Corporation in accordance with this Court's order of June 6, 1991; and

2. The Clerk is hereby directed to enter final judgment dismissing all claims of Plaintiff Wichita Falls Office Associates against Defendants Bank One Texas, N.A. and/or Banc One Corporation.

SO ORDERED.

DATED: October 24, 1991.

/s/ BAREFOOT SANDERS

Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

Appendix D

D.

JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION,
OCTOBER 24, 1991

Appendix D

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES *Plaintiff* v. BANC ONE CORPORATION, ET AL. *Defendants*	CIVIL ACTION No. 3-90-1301-H

JUDGMENT

This Judgment is entered pursuant to the Court's Order dated October 24, 1991.

It is ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff Wichita Falls Office Associates take nothing by its claims against Banc One Texas, N.A. and Banc One Corporation, and that such claims be, and they are hereby, DISMISSED ON THE MERITS at Plaintiff's costs.

SIGNED THIS 24th day of October, 1991.

/s/ BAREFOOT SANDERS

Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

Appendix E

E.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION, JUNE 4, 1991

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES, *Plaintiff* v. BANC ONE CORPORATION, ET AL., *Defendants*	CIVIL ACTION NO. 3-90-1301-H

ORDER

Before the Court are the Bank One Defendants' Application for Review and Objections to Magistrate's Order, filed May 6, 1991; the Response of Plaintiff Wichita Falls Office Associates, filed May 16, 1991; and the Response of the FDIC Defendants, filed May 28, 1991.

On April 22, 1991, the Bank One Defendants moved for a protective order staying all discovery in this case or, alternatively, requiring Plaintiff Wichita Falls Office Associates ("WFOA") to complete document production prior to taking fifteen depositions WFOA had noticed for the end of April and early May. The primary basis for the motion was the fact that the Bank One Defendants have a motion for summary judgment pending and further discovery before the Court decides that motion is unnecessary and wasteful. The Court referred the Motion to United States Magistrate Judge John Tolle, who conducted a hearing by telephone. Magistrate Judge Tolle denied the motion for protective order. *See*, Order entered April 23, 1991. The Bank One Defendants, joined by the FDIC, now ask the Court to review the Magistrate Judge's April 23 Order.

It is well established that a district court has broad discretion in limiting discovery. *See McLean v. International Harvester Co.*, 817 F.2d 1214, 1224 (5th Cir. 1987) (noting the "fundamental rule" in the Fifth Circuit that "a district court possesses broad discretion in its supervision of discovery"); *Mayo v. Tri-Bell Industries, Inc.*, 787 F.2d 1007, 1012 (5th Cir. 1986) ("Control of discovery is committed to the sound discretion of the trial court and its discovery rulings will be reversed only where they are arbitrary or clearly unreasonable.").

The pending motion for summary judgment was filed almost a year ago. WFOA responded to the motion on July 27, 1990. In its Response WFOA stated that "[i]n light of recent discovery conducted by WFOA [the Banc One Defendants'] contentions are incredible" and that "[i]t is . . . a matter of absolutely undisputed fact" that Banc One is to blame for WFOA's troubles. Plaintiff's Response at 24. In short, WFOA concedes that no discovery is needed to adequately address the Banc One Defendants' pending summary judgment motion. In light of that fact, it would constitute a senseless waste of all of the parties' resources to permit further discovery until the Court rules on the pending motion for summary judgment. *See Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) (affirming order staying discovery until trial court could determine whether case would be resolved at summary judgment stage).

Accordingly, the Banc One Defendants' present motion is GRANTED, the Magistrate Judge's Order of April 23, 1991 is hereby VACATED and all discovery in this case is hereby STAYED pending further order of the Court.

SO ORDERED.

Dated: June 4, 1991.

/s/ BAREFOOT SANDERS

Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

Appendix F

F.

ORDER OF THE UNITED STATES MAGISTRATE JUDGE, NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, APRIL 23, 1991

Appendix F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES vs. BANC ONE CORPORATION, ET AL	CIVIL NO. CA3-90-1301-H

ORDER

Under authority of 28 U.S.C. § 636(b) and the Local Rules of this Court, the motion by Banc One Defendants for Protective Order, filed April 22, 1991, was referred to the magistrate for determination. A telephone conference was conducted with counsel for all parties on April 23, 1991. And having reviewed the said motion, and having heard the arguments of counsel, and being advised by counsel that this case is tentatively set for trial in November, 1991, and that the Court has imposed a discovery cut-off of July 22, 1991,

It is therefore ORDERED that the Motion for Protective Order be, and the same is, hereby denied.

And being further advised that Defendants intend to file an objection to this order pursuant to the provisions of Rule 72(a) of the Federal Rules of Civil Procedure,

It is further ORDERED that this order is hereby stayed for a period of ten (10) days. If a proper objection is filed and served within such ten (10) day period, the stay will remain in effect until the Judge of this Court has disposed of the objection. If no such objection is filed, this order will expire at the end of such ten (10) day period.

All relief not expressly granted herein is denied.

Signed this 23rd day of April, 1991.

/s/ JOHN B. TOLLE
United States Magistrate

APPENDIX G

G.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, WICHITA FALLS DIVISION, DENYING DEFENDANT'S MOTION TO DISMISS MAY 29, 1990

Appendix G

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

WICHITA FALLS OFFICE ASSOCIATES,

Plaintiff,

v.

BANC ONE CORPORATION, et al.,

Defendants.

CIVIL ACTION CAUSE
NO. CA-7-89-0059

ORDER DENYING DEFENDANT'S MOTIONS TO DISMISS

Before the Court are Defendants' Motions to Dismiss, both filed January 30, 1990, Plaintiff's timely Response in opposition, filed March 21, 1990, and Defendant FDIC's Reply, filed May 2, 1990.

The Court finds that it has jurisdiction over Plaintiff's claims of denial of due process and of arbitrary and capricious administrative decision. The Court expresses no opinion on the balance of Plaintiff's claims or Defendants' remaining motions.

Defendants' Motions to Dismiss are denied.

It is SO ORDERED.

Signed this the 29th day of May, 1990.

/s/ MARY LOU ROBINSON
Mary Lou Robinson
United States District Judge

Appendix H

H.

ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION,
GRANTING DEFENDANT'S MOTIONS
FOR CHANGE OF VENUE
MAY 29, 1990

Appendix H

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

WICHITA FALLS OFFICE ASSOCIATES,
Plaintiff.

v.

BANC ONE CORPORATION, ET AL.,
Defendants.

CIVIL ACTION CAUSE
NO. CA-7-89-0059

ORDER GRANTING DEFENDANT'S MOTIONS FOR CHANGE OF VENUE

Before the Court are Defendants' Motions for Change of Venue, both filed January 30, 1990, Plaintiff's timely Response, filed March 21, 1990, and Defendant FDIC's Reply, filed May 2, 1990.

The Court finds that the mandatory and irrevocable venue selection provision contained in the note at issue in this litigation validly selects the Dallas Division of the Northern district of Texas as the forum of proper venue for this action. Pursuant to 28 U.S.C. §1406 (a), this action will therefore be transferred there. Defendants' Motions for a change of venue are granted.

This suit is transferred to the Dallas Division of the Northern District of Texas.

It is SO ORDERED.

Signed this the 29th day of May, 1990.

/s/ MARY LOU ROBINSON
Mary Lou Robinson
United States District Judge

Appendix I

I.

ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, JANUARY 20, 1993

Appendix I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7303

WICHITA FALLS OFFICE ASSOCIATES,

Plaintiff-Appellant,

versus

BANC ONE CORPORATION, ET AL.,

Defendants,

BANC ONE CORPORATION AND
BANC ONE TEXAS, N.A.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(January 20, 1993)

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges
and
ROSENTHAL,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered case be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ REYNALDO G. GARZA
United States Circuit Judge

* District Judge of the Southern District of Texas, sitting by designation.

Appendix J

J.

JOINT STATUS REPORT REGARDING SETTLEMENT NEGOTIATIONS, NOVEMBER 1, 1990

Appendix J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES, *Plaintiff.* v. BANC ONE CORPORATION, BANK ONE TEXAS, N.A. and THE FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity and in its capacity as Receiver of MBank-Wichita Falls, *Defendants.*	CA-3-90-1301-H

JOINT STATUS REPORT REGARDING SETTLEMENT NEGOTIATIONS

Pursuant to this court's scheduling order of July 9, 1990, counsel for plaintiff and defendants hereby submit this joint report setting forth the status of settlement negotiations.

1. *WFOA and FDIC.*

Plaintiff, Wichita Falls Office Associates ("WFOA"), and Defendant Federal Deposit Insurance Corporation, in its corporate capacity and in its capacity as Receiver of MBank-Wichita Falls ("FDIC"), have recently begun to discuss ways in which WFOA's claims against the FDIC may be settled. These discussions are ongoing and their success or failure should be known within the next several weeks.

2. *WFOA and The Bank One Defendants.*

There are currently no discussions or negotiations between Plaintiff WFOA and Defendants Banc One Corporation and Bank One, Texas, N.A. (collectively, the "Bank One Defendants") regarding settlement of WFOA's claims against the Bank One Defendants.

Dated: November 1, 1990.

Respectfully submitted,

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BANK ONE TEXAS, N.A.

Appendix K

K.

SUPPLEMENTAL JOINT STATUS REPORT REGARDING SETTLEMENT NEGOTIATIONS, December 26, 1990

Appendix K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES, *Plaintiff.* v. BANC ONE CORPORATION, ET AL., *Defendants.*	C.A. 3-90-1301-H

SUPPLEMENTAL JOINT STATUS REPORT REGARDING SETTLEMENT NEGOTIATIONS

Pursuant to this court's scheduling order of November 6, 1990, counsel for plaintiff and defendants hereby submit this joint report setting forth the status of settlement negotiations.[1]

1. *WFOA and FDIC.*

Plaintiff, Wichita Falls Office Associates ("WFOA"), and Defendants Federal Deposit Insurance Corporation in its corporate capacity and Federal Deposit Insurance Corporation in its capacity as Receiver of MBank-Wichita Falls, N.A. ("FDIC") are continuing their discussions of ways in which WFOA's claims against the FDIC may be settled. As part of the FDIC's consideration of a settlement proposal forwarded by WFOA, the FDIC has requested that WFOA allow an appraiser to evaluate the building at issue. WFOA has consented to this request.

2. *WFOA and The Bank One Defendants.*

There are currently no discussions or negotiations between WFOA and Defendants Banc One Corporation and Bank One,

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[1] The parties apologize to the Court for the late filing of this status report.

Texas, N.A. (collectively, the "Bank One Defendants") regarding settlement of WFOA's claims against the Bank One Defendants.

Dated: December 26, 1990.

Respectfully submitted,

/s/ W L DENNIS (MM)

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and
BANK ONE TEXAS, N.A.

Appendix L

L.

JOINT STATUS REPORT OF THE PLAINTIFF AND DEFENDANT FDIC WITH RESPECT TO SETTLEMENT, MAY 8, 1991

Appendix L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WICHITA FALLS OFFICE ASSOCIATES, *Plaintiff.* v. BANC ONE CORPORATION, ET AL., *Defendants.*	CA-3-90-1301-H

JOINT STATUS REPORT OF THE PLAINTIFF AND DEFENDANT FDIC WITH RESPECT TO SETTLEMENT

Plaintiff Wichita Falls Office Associates ("WFOA") and defendant Federal Deposit Insurance Corporation ("FDIC"), in its corporate capacity and its capacity as Receiver for MBank Wichita Falls, N.A., resubmit the Report of the Plaintiff and Defendant FDIC With Respect to Settlement filed with the Court on January 30, 1991. The status of settlement discussions between WFOA and the FDIC remains unchanged.

1. Counsel for WFOA and FDIC represent to the Court that tentative settlement as to claims against the FDIC relating to the status of the note at issue, the disaffirmance of the ground leases and the disaffirmance of the Master Net Lease has been reached between counsel. This settlement is contingent upon additional approvals at various levels within the FDIC and an additional appraisal, the results of which are currently being awaited. The proposed settlement, if implemented, would remove the FDIC as a party in the litigation.

2. Counsel for WFOA represent to the Court that:

a) Time continues to be of the essence in this settlement and WFOA has advised the FDIC that practical considerations relating to maintenance and operation of the building make it

essential that the FDIC decide quickly whether to approve the settlement, or to proceed with this litigation;

b) The proposed settlement would be structured so as not to prejudice any claims of WFOA against Defendants Banc One Corporation and Banc One Texas, N.A.;

c) Bank One Corporation and Bank One Texas, N.A. have not engaged in any settlement discussions with plaintiff with regard to any of the issues between them, and it does not appear that such settlement discussions are likely to occur;

d) In the event that the settlement with the FDIC goes forward, it may be necessary for plaintiff WFOA to amend its complaint to either add or subtract certain claims and/or parties.

Respectfully submitted,

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FILED
APR 6
OFFICE

No. 92-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BANK ONE, TEXAS, N.A., AND BANC ONE CORPORATION,
Petitioners,

—vs.—

WICHITA FALLS OFFICE ASSOCIATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether there is a split of authority in the Courts of Appeal regarding the interpretation and application of Rule 56(f) justifying issuance of a writ of certiorari?

2. Whether the Court of Appeals for the Fifth Circuit, consistent with the uniform view of Rule 56(f) in the Circuits, properly reversed a grant of summary judgment on plenary review because of the absence of a full and fair opportunity for discovery?

RULE 29.1 STATEMENT

Respondent Wichita Falls Office Associates is a partnership with no parent or subsidiary companies.

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STATEMENT OF THE CASE

Petitioners assert that "Respondent never directed any of its discovery at Petitioners' pending motion for summary judgment." (Pet. at 8). The Court need not long be detained by that assertion. Petitioners concede that Respondent informed the District Court that the discovery related to matters that would "support its opposition to the defendants' motion for summary judgment" and "its existing causes of action." (Pet. at 9-10).

The discovery needed to oppose Petitioners' summary judgment motion, actually issued well prior to the grant of summary judgment, included in excess of a dozen notices of deposition and numerous document requests. It was highly controverted. The District Court had before it Petitioners' motion for a protective order to prevent the discovery, the Magistrate Judge's denial of the motion, *and* Respondent's extensive opposition to that motion, when it improperly terminated discovery and entered summary judgment in favor of Petitioners. (*See* Respondent's principal appellate memorandum at 14-17; Respondent's reply appellate memorandum at p. 7).[1]

Thus, on *de novo* review, the Fifth Circuit observed:

> WFOA did specify its intended subject matter in its request for supplemental depositions and in document requests . . . Unquestionably, these requests related directly to the pending summary judgment motion.
>
> The amalgam of WFOA's actions did put the trial court on notice that it sought discovery regarding

---

[1] It is noteworthy that Petitioners' motion for a protective order was initially denied by the Magistrate Judge. *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992).

> the Rainey letter, the bank's calculation of rent, interpretive documents relating to Section 4.4(d), and the bank's policy on disaffirmance.
>
> These issues were germane to the pending summary judgment motion and therefore the stay [of discovery] was improvidently granted. While we are generally reluctant to substitute our judgment for that of the district court, we think it wiser for the district court to defer its summary judgment determination until after WFOA has had a chance to obtain its requested discovery.

978 F.2d at 919-20 (material in brackets added).

Petitioners also imply that the District Court never authorized Respondent's discovery and that it was untimely. (Pet. at 11.) On February 6, 1991, the District Court issued a scheduling order setting a discovery cutoff date of July 22, 1991. Respondent served the discovery at issue on April 3, 1991. Moreover, the District Court's scheduling orders were issued at the request of the parties, *including the Petitioners.* In fact, the January 30, 1991 joint status report (not submitted by Petitioners with their Petition) said:

> Counsel for WFOA *and for the Banc One defendants* have conferred and agree that, in the event that settlement with the FDIC goes forward, *both parties would request a new Scheduling Order* enlarging the time to designate experts, add parties, make motions and the like in order to accommodate the new configuration of the case after settlement with the FDIC.

(R. 860-62, emphasis supplied).

SUMMARY OF ARGUMENT

The "conflict" Petitioners urge does not exist. No case cited by the Petitioners supports a different result than the one that occurred here.

Moreover, even if this interlocutory case was remanded on certiorari, the Fifth Circuit would proceed to review the summary judgment record *de novo*, and the Fifth Circuit has already recognized the merits of Respondent's opposition to Petitioner's motion for summary judgment when it discussed how and why the terminated discovery was directly relevant to the motion. Thus, the case would end up back in the district court, where it is now.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT INVOLVE A CONFLICT OVER THE CONSTRUCTION OR APPLICATION OF ANY PRINCIPLE OF LAW.

Petitioners claim that certiorari is required because the Fifth, Eleventh, Ninth, Fourth, First and D.C. Circuits "have all ruled . . . that it is unnecessary for the nonmovant to comply with Rule 56(f)" while other circuits require "strict compliance" with the Rule. (Pet. at 12, 16.)

There is no such conflict. First, the Fifth Circuit did not misapply Rule 56(f) here. Second, the interpretation of Rule 56(f) followed in this and other cases is wholly consistent with the application of Rule 56(f) throughout all the circuits. Certiorari is thus inappropriate because "the asserted conflict in decisions arises from differences in states of fact, and not

in the application of a principle of law." *Wisconsin Electric Co. v. The Dunmore Co.*, 282 U.S. 813 (1930).[2]

In fact, the "exception" to Rule 56(f)'s procedural rigors was applied here only because Respondent fully complied with the substantive requirements of the Rule. Respondent "diligently [pursued] relevant discovery" and it

> (i) [requested] extended discovery prior to the court's ruling on summary judgment; (ii) put the trial court on notice that further discovery pertaining to the summary judgment motion is being sought; and (iii) [demonstrated] to the trial court specifically how the requested discovery pertain[ed] to the pending motion.

978 F.2d at 919 (citations omitted) (material in brackets added).

The Fifth Circuit never indicated that it is "unnecessary" for litigants to "comply" with Rule 56(f).[3] Here, in fact, it

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[2] We note that this Court has twice denied certiorari when the Fifth Circuit held, as it did here, that the nonmovant did not need to file a Rule 56(f) affidavit because it met its substantive burden under the Rule. *See Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); *International Shortstop, Inc. v. Ralley's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 936 (1992).

[3] The Fifth Circuit has consistently enforced the *substantive* requirements of Rule 56(f) even in cases where it indicates unwillingness to create procedural traps because of the Rule. *See, Robbins v. Amoco Production Co.*, 952 F.2d 901, 907 (5th Cir. 1992); *Washington v. Allstate Insurance Co.*, 901 F.2d 1281, 1285-86 (5th Cir. 1990); *Netto v. Amtrak*, 863 F.2d 1210, 1216 (5th Cir. 1989); *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136-37 (5th Cir. 1987); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). That — and only that — is what occurred here.

carefully limited its holding to "the unique facts of this case, taken as a whole," and "strongly urge[d] future litigants to file a formal Rule 56(f) motion in the district court when they seek additional discovery while a summary judgment motion is pending." 978 F.2d at 920, n.6.

Rule 56(f) is intended to protect — and certainly not hurt — nonmovants by "keep[ing] open the doors of discovery in order to adequately combat a summary judgment motion." 978 F.2d at 919 (material in brackets added). The "exception" to Rule 56(f) only applies where, as here, the substantive requirements of the Rule have been well met by other documentary filings and blind insistence that such statements be in affidavit form would produce manifest injustice. *See, e.g., Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) (*en banc*), *cert. denied*, 414 U.S. 1116 (1973) ("Form is not to be exalted over fair procedures.").

The manifest injustice Petitioners seek in this case has no precedent. We have found no case (nor, apparently, have Petitioners) in which *any* circuit court has held that, although the nonmovant met its substantive burden under Rule 56(f), summary judgment would be upheld solely because of the lack of a ritualistic piece of paper saying "I am a Rule 56(f) affidavit."

This Court has consistently rejected arguments, like the one advanced by Petitioners, that thus distort the intent of rules of procedure:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice . . . would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Hormel v. Helvering, 312 U.S. 552, 557 (1941).[4]

Indeed, even among those circuits which Petitioners classify as requiring "strict compliance" with Rule 56(f), the cases actually either excuse the affidavit requirement altogether[5] or, after noting the absence of an affidavit, base their decision on deficiencies in the nonmovant's compliance with the substantive requirements of Rule 56(f).[6]

The other cases relied upon by Petitioners to create the appearance of a conflict are similarly unavailing.[7]

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[4] *See also, e.g., Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966), where this Court reinstated a suit that the trial court dismissed because of defects in a Rule 23(b) affidavit: "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. . . . If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice."

[5] *Sames v. Gable*, 732 F.2d 49, 51-52 (3d Cir. 1984) discussed in *Lunderstadt v. Colafella*, 885 F.2d 66, 70-72 (3d Cir. 1989); *Harris v. Pate*, 440 F.2d 315, 317-19 (7th Cir. 1971).

[6] *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d Cir. 1988); *Dreiling v. Peugot Motors of America, Inc.*, 850 F.2d 1373, 1376-77 (10th Cir. 1988); *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986); *Beltin v. Morris Nelson* Farms, Inc., 744 F.2d 53, 58 (8th Cir. 1984).

[7] In some, the nonmovant in fact *filed* an affidavit but it was held substantively defective. *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 422 (2d Cir. 1989); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 1388 (Fed. Cir. 1989); *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989); *United*

(continued...)

Thus, any differences among the circuits are attributable to differences in the facts of the cases, or such differences are hypothetical, appearing as they do in *dicta*. They are not the result of any real or substantial conflict among the circuits in the interpretation or application of Rule 56(f).[8]

II. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW IS INTERLOCUTORY AND CAPABLE OF RESOLUTION ON OTHER GROUNDS.

The decision of the Fifth Circuit makes no merits disposition. It simply remands the case to the trial court for

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[7](...continued)
States of America ex rel. Small Business Admin. v. Light, 766 F.2d 394, 398 (8th Cir. 1985); *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975). In others, no request for further discovery had been made in any form. *Pittman v. Gaines*, 905 F.2d 199, 201 (8th Cir. 1990); *New America Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1081 (Fed. Cir. 1989); *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313, 317 (7th Cir. 1987). In the few remaining cases, there is no true conflict with the case *sub judice* because the cases do not indicate that any effort was made by the nonmovant to satisfy the substantive requirements of Rule 56(f). *Klepper v. First American Bank*, 916 F.2d 337, 343 (6th Cir. 1990); *United States v. McCallum*, 970 F.2d 66, 71 (5th Cir. 1992).

Petitioners suggest that *McCallum* and *Robbins v. Amoco Production Co.* are inconsistent with the "reasoning" in this case and that an intra-circuit conflict therefore exists. (Pet. at 20). However, any difference between those cases and this one is about factual differences and the strength or weakness of the attempted substantive Rule 56(f) showing.

[8] Even if a conflict developed at a future date, the issue is so hypertechnical, academic, and narrow that it is *per se* not worthy of the Court's time and attention. *Cf. Commissioner v. Factor*, 364 U.S. 932 (1961); R. Stern & E. Grossman, *Supreme Court Practice* 200 (6th Ed. 1986).

further proceedings. Thus, it is not ripe for Supreme Court review. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostok R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Respondent's merits claims were briefed below but not decided: "Because we find that the district court improperly curtailed discovery we do not address the summary judgment contentions." 978 F.2d at 920.[9]

We note here that if the Fifth Circuit sitting on plenary review, had believed (as Petitioners urge) that the record contained no issues of fact, it could simply have affirmed. Instead, the Court, to the extent it discussed merits, categorized as "disputed" facts that are at the "crux" of this case. 978 F.2d at 917.

Thus, it is unlikely that, even if this Court granted certiorari *and* remanded, the Fifth Circuit would affirm on *de novo* review. Having held that discovery was improperly cut off, the Fifth Circuit is likely to take a dim view of Petitioners' arguments that they are entitled to summary judgment as a matter of law. Nothing would even be accomplished by granting certiorari.

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[9] Thus, Petitioners misleadingly asserted that "the Fifth Circuit never questioned the district court's determination that Petitioners had discharged their burden under Rule 56(c)" and that "the Fifth Circuit never took issue" with the trial court's ruling on the third-party beneficiary theory, "did not disagree" with the district court's contract analysis, and "reversed a fully substantiated summary judgment." (Pet. at 24 n.10; 30-31).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 92-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BANK ONE, TEXAS, N.A., AND BANC ONE CORPORATION,
Petitioners,

vs.

WICHITA FALLS OFFICE ASSOCIATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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No. 92-1523

IN THE

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OCTOBER TERM, 1992

BANK ONE, TEXAS, N.A., AND BANC ONE CORPORATION,
Petitioners,

VS.

WICHITA FALLS OFFICE ASSOCIATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

Petitioners Bank One, Texas, N.A. and Banc One Corporation submit the following Reply to Respondent Wichita Falls Office Associates' "Brief In Opposition To Petition For A Writ Of Certiorari."

RESPONSE TO RESPONDENT'S "STATEMENT OF THE CASE"

Petitioners reiterate that Respondent made no request for the discovery it now claims to have been critical to its ability to defeat

summary judgment until *eight months after it responded on the merits to Petitioners' motion for summary judgment.*[1] Most importantly, Respondent never once complained *in the district court* that it required the additional discovery to defeat Petitioners' motion for summary judgment.

Respondent does not dispute any of the factual assertions contained in the Petition for Writ of Certiorari. In its brief in opposition, however, Respondent claims that Petitioners "concede" that Respondent informed the district court that additional discovery was required with respect to issues raised by the motion for summary judgment. (*Resp.*, p.1). This is simply not the case. As described in the Petition and in text of the district court's opinion, the statements made by Respondent in its filings with the district court actually caused that court to conclude that Respondent required no additional discovery to respond to the motion for summary judgment. (*Pet.*, p.7-8; E-2). The record clearly shows that Respondent never requested additional time to secure discovery "essential" to justify its opposition to the motion.

It is revealing that the opinion of the Court of Appeals makes no reference to any requests by Respondent for additional time to conduct discovery relating to the summary judgment issues. Respondent's only requests relating to discovery were for extensions of the discovery cutoff date imposed by the district court pursuant to Rule 16 of the Federal Rules of Civil Procedure.[2] These unopposed requests for extensions had nothing to do with the pending motion for summary judgment. Indeed,

---

[1] There was no stay prohibiting Respondent from securing discovery until discovery was stayed in response to Petitioners' motion for protective order. Petitioners filed their motion for protective order in response to a "barrage" of discovery first served by Respondent more than eight months after Petitioners' motion for summary judgment was ripe for disposition.

[2] In relying upon these requests for extensions of the discovery cutoff deadline, Respondent implies that summary judgment should never be

Petitioners joined in the requested extensions of the discovery cutoff date precisely because they did not wish the district court's scheduling deadlines to place the parties in a posture which would compel them to engage in expensive and unnecessary discovery (and motion practice) before the district court had ruled on Petitioners' meritorious motion for summary judgment. Thus, Respondent's assertion that there is significance to be derived from the fact that the referenced extensions of the discovery cutoff deadline were requested by all of the parties, including Petitioners, fails to acknowledge Petitioners' motive for joining in the requests. (*Resp.*, p.2).

Respondent's reliance on the ruling of the Magistrate Judge is inexcusable. Respondent *never* argued to the Magistrate Judge that it required the additional discovery to rebut Petitioners' motion for summary judgment. (*Pet.*, p.9, n.6). Respondent urged the Magistrate to allow discovery to proceed only because the case was set for trial and the discovery cutoff date was fast approaching — not because of any asserted need for additional evidence to meet the summary judgment threat. The Magistrate's ruling reflects nothing more than his unwillingness to interfere with the district court's scheduling order. (*Pet.*, p.F-1).

ARGUMENT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER CONSTRUCTION OF RULE 56(f)

Challenging the conclusion reached by several of the Courts of Appeals, Respondent claims that there is no conflict among the circuits with respect to Rule 56(f). Respondent arrives at its conclusion by drawing an alleged distinction between what it refers to as "substantive" compliance with Rule 56(f) and what it characterizes as the "ritualistic" compliance urged by Petitioners.

---

granted until the discovery deadline has passed. In Petitioners' view, such a rule defeats the purpose of the summary judgment procedure.

(Resp., p.4-5). According to Respondent, no circuit would uphold a summary judgment merely because the reasons supporting the request for a delay in the disposition of the motion were not presented in the form of a Rule 56(f) affidavit.[3] The cases cited in the Petition refute this contention. *See, e.g., Town Sound and Custom Tops v. Chrysler Motors,* 959 F.2d 468, 494, n.39 (3rd Cir. 1992) (plaintiffs requested but did not obtain information conceded to be "relevant"; however, "it was incumbent on them to file a Rule 56(f) affidavit" if they believed the information was necessary to defeat the motion for summary judgment); *Klepper v. First American Bank,* 916 F.2d 337, 343 (6th Cir. 1990) (court states that "normally" appellant "might have prevailed" on challenge to summary judgment where district court gave non-movant "no opportunity to engage in discovery" prior to granting summary judgment; however, judgment is affirmed because non-movant failed to meet his "burden" under 56(f) by "not presenting any affidavit as required under Rule 56(f)."); *Avia Group Intern., Inc. v. L.A. Gear California,* 853 F.2d 1557 (Fed. Cir. 1988) (had non-movant filed an affidavit, "there would be an appealable discovery issue. Having failed to do so, there is none.")[4]

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[3] Of course, there is much more here than Respondent's failure to submit an affidavit. Respondent made no attempt to secure a delay of the summary judgment proceedings, and actually made affirmative representations unequivocally indicating that it did not require additional time to secure discovery. Only on appeal to the Fifth Circuit did Respondent raise any question as to the sufficiency of its opportunity to take discovery for the purpose of meeting Petitioners' motion for summary judgment. Thus, whatever acts Respondent believes might be adequate to satisfy its test of "substantive" compliance with Rule 56(f), those acts were certainly not taken in this case.

[4] Respondent has taken some liberties with the relevant authorities. It is true that the Third Circuit's decision in *Sames v. Gable,* 732 F.2d 49 (3rd Cir. 1984) suggests that Circuit's willingness to ignore the requirements of Rule 56(f). It is equally true that the Third Circuit subsequently relegated *Sames* to the status of an aberration in an

Respondent's position is based on a faulty premise — that courts can and should excuse a non-movant's failure to comply with Rule 56(f) because that provision was "intended to protect — and certainly not hurt" non-movants. *(Resp., p.5)*. This is simply not true. As described in the Petition, Rule 56(f) protects *movants* as well as non-movants. (*Pet.*, p. 24-28). First, the requirement that an affidavit be filed compels the non-movant to support its asserted need for additional time with sworn statements setting forth the specifics of how the additional time will allow it to secure the evidence "essential" to avoid summary judgment. Second, it ensures that before the district court agrees to prejudice the movant by deliberately delaying its ruling on the motion, it has determined on the basis of the non-movant's sworn statements that the latter has a serious need for the additional time (i.e. that it has not been dilatory) and that the evidence it seeks is "essential" to defeat the motion.[5]

Third, the non-movant's 56(f) affidavit provides the district court with the reliable information that court needs to ensure that any additional discovery it may allow is focused solely on the development of potential genuine issues of material fact. Thus, even if a continuance is granted, the district court can utilize the information in the affidavit to protect the moving party against the

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otherwise consistent line of cases requiring strict compliance with Rule 56(f). *Radich v. Good,* 886 F.2d 1391, 1393 (3rd Cir. 1989). Thus, it is now clear that the factors that led to the result in *Sames* will only be relevant "when a proper Rule 56(f) affidavit is filed." *Contractors Ass'n of E.Pa. v. Philadelphia,* 945 F.2d 1260, 1267 (3rd Cir. 1991). Indeed, the Third Circuit's decision in *Lunderstadt v. Colafella,* 885 F.2d 66 (3rd Cir. 1989), contains an express warning reminding members of the bar of the *"requirement"* that an affidavit be filed in support of Rule 56(f) relief. *Id.* at 70-71 (emphasis in original).

[5] The use of the word "essential" in Rule 56(f) obviously requires a showing that the discovery is aimed at securing pivotal information, and not information that would simply be nice to have.

time and expense that would otherwise be incurred in responding to discovery requests that have no bearing on any issue relevant to the motion.[6]

Finally, the 56(f) affidavit provides the record that may later justify the fee and cost shifting mandated by Rule 56(g). Indeed, the filing of the affidavit is an express prerequisite to the non-movant's receiving protection under Rule 56(g). (*Pet.*, p. 28-29).

Thus, even assuming, *arguendo,* that the plain language of Rule 56(f) can be ignored in order to accommodate Respondent's "substantive" compliance standard (and it cannot be), that standard would still transgress the policies that 56(f) seeks to promote. The fact is that Rule 56(f) strikes a balance between the competing interests of movants and non-movants. While its provisions "protect" non-movants by providing a means through which the latter may "keep open the doors of discovery," they likewise protect movants by ensuring that any delay for the benefit of the non-movant is supported by the non-movant's showing that the delay is truly necessary to promote the interests of justice. When the non-movant fails to make such a showing, relief is appropriately denied. *See, e.g., Jarvis v. Nobel/Sysco Food Services Co.,* 985 F.2d 1419, 1422-23 (10th Cir. 1993) (upholding district court's conclusion that affidavit did not support relief under Rule 56(f)).

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[6] The Rule 56(f) affidavit also facilitates appellate review of the propriety of the district court's ruling on the non-movant's request for 56(f) relief.

II.

THE FACT THAT THE COURT OF APPEALS REMANDED THE CASE FOR FURTHER PROCEEDINGS SHOULD HAVE NO BEARING ON THIS COURT'S DECISION TO GRANT OR DENY CERTIORARI

The fact that the Fifth Circuit reversed the summary judgment and remanded for further proceedings should not impact this Court's consideration of the merits of the Petition. In the landmark case of *Celotex v. Catrett,* this Court granted certiorari to review a judgment of the Court of Appeals that reversed the district court's grant of summary judgment and remanded the case for further proceedings. *Catrett v. Johns-Manville Sales Corp.,* 756 F.2d 181, 187 (D.C. Cir. 1985), *rev'd, Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Indeed, the reversal of a summary judgment will almost always involve a remand. Thus, the Court has indicated that it will not decline review in a summary judgment case simply because the case has been remanded to the district court.[7]

Petitioners are at a loss to understand Respondent's argument that the Fifth Circuit "could simply have affirmed" if it believed that there were no genuine issues of material fact. (*Resp.,* p.8). Conversely, the Fifth Circuit could simply have reversed without relying on the discovery issue if it truly believed that the record revealed a single genuine issue of material fact. Instead, it chose to reverse only because it concluded that the district court had prematurely terminated discovery. If anything, the Fifth Circuit's rationale strongly suggests that it *did* conclude that the record

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[7] Acceptance of Respondent's argument that the "interlocutory" nature of the Fifth Circuit's ruling renders this case an inappropriate candidate for certiorari would mean that every judgment of a Court of Appeals reversing and remanding a summary judgment would escape this Court's scrutiny. Petitioners respectfully submit that no jurisprudential interest is served by application of such a blanket restriction.

before it presented no genuine issues of material fact and that, but for the discovery issue, it would have affirmed.

Respondent presumes that this Court will remand the case to the Fifth Circuit for further consideration. (*Resp.*, p.8) For the reasons described in Point IV, Pages 30-31 of their Petition, Petitioners believe that the district court's analysis clearly and unequivocally explains why Petitioners are entitled to judgment as a matter of law. The district court's analysis consisted almost exclusively of its exposition and application of the governing principles of Texas law, and was not based on the inadequacy of Respondent's factual showing. Contrary to Respondent's suggestion, the Court of Appeals never challenged the correctness of the district court's legal analysis. Thus, this Court may very well conclude that a remand to the Court of Appeals is unnecessary, and render judgment in favor of Petitioners.

Finally, the principle involved in this case is an important one. The sheer volume of reported cases at both the district court and court of appeals levels demonstrates that Rule 56(f) issues arise on a daily basis throughout the federal system. Given the degree of conflict and confusion apparent from any fair comparison of the cases, this Court's guidance in this area is needed. Furthermore, even if the issue was not one that regularly confronted the lower federal courts, the Rule's central role in modern federal summary judgment practice would be sufficient in itself to merit this Court's attention.

CONCLUSION

For all the foregoing reasons, and for the reasons expressed in their Petition, Petitioners Bank One, Texas, N.A. and Banc One Corporation respectfully request that this Court grant their Petition for Writ of Certiorari, and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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